Supreme Court, U.S.
FILED

02 814 OCT 29 2002

NO. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

REMIGIO I. AGUSTIN – PETITIONER
vs.

JOHN H. DALTON- RESPONDENT
Secretary,
U. S. Department of the Navy

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Remigio I. Agustin
169 Austin Avenue
Hayward, California 94544
Tel. No. (510)-786-2819

124 pp

QUESTIONS PRESENTED

(1) (a) Whether 29 USC Section 791 granted greater "affirmative action" accommodation protection to "individuals with disabilities"; (b) whether such individuals with disabilities have the same fair and equal right "to the *same* workplace opportunities [or equal benefits and privileges of employment] that those without disabilities automatically enjoy" (U.S. Airways, Inc., v. Barnett, 122 S.Ct. 1516, 1521 (2002)); and (c) whether the District Court's 5-23-01, 6-8-01, and 7-11-01 Orders, and the Ninth Circuit's 6-17-02 Memorandum affirmance of such Orders in the instant case, are in conflict with, or in violation of, among others: the First Amendment-constitutional right "to petition"-case law in BE & K Construction Co. v. NLRB, 122 S.Ct, 2390, 2396 (2002); "the beginning point must be the language of the statute"-case law in Estate of Cowart v. Nicklos Drilling, 505 U.S. 469, 475 (1992); the "basic equal opportunity goal"-case law in U.S. Airways, Inc., v. Barnett, 122 S.Ct. 1516, 1521 (2002); the Rehabilitation Act-scope of protection-case law in Buckingham v. U.S., 998 F.2d 735, 740-741, at note 3 (9th Cir. 1993); the "distinction exists" between 29 USC Section 791 and 794-case law and the "private cause of action"-case law in Johnston v. Horne, 875 F.2d 1415, 1418 (9th Cir. 1989); our U.S. Constitution's Equal Protection guarantee under the equal protection component of the Fifth Amendment; and Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding that the inartful pleadings of a pro se complainant, such as Agustin, must be held "to less stringent standard than formal pleadings drafted by lawyers"); and

(2) whether federal and postal employees have a right to a private cause of action under the Back Pay Act (5 USC Section 5596) when federal or postal employers violate our money-mandating statutes or regulations such as 5 USC Sections 6382(a)(1)(D) (compare Russell v. U.S. Department

of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999)), 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1),(2); and

(3) whether the Ninth Circuit's 6-17-02 Memorandum opinion in the instant case that it "lack jurisdiction to address Agustin's appeal of the district court's summary judgment" was in conflict with, or in violation of: FRAP 4(a)(4), this Court's case law in U.S. v. Healy, 376 U.S. 75 (1964) and U.S. v. Ibarra, 502 U.S. 1, 7 (1991), and the Ninth Circuit's own case law in Adonican v. City of Los Angeles, CA9 No. 01-17303 (8-6-02) (page 11179 at CA9 internet website) and United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232 (1958) (which was quoted in Adonican); or in the alternative, this Court's equitable tolling case law in Young v. U.S., 122 S.Ct. 1036, 1040-1041 (2002), and in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iv-vii
TABLE OF AUTHORITIES	viii-xvi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1-2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. **WITH RESPECT TO THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S 5-23-01, 6-8-01, AND 7-11-01 ORDERS**	4
II. **WITH RESPECT TO FEDERAL AND POSTAL EMPLOYEES' RIGHT TO A PRIVATE CAUSE OF ACTION UNDER THE BACK PAY ACT (5 USC SECTION 5596) WHEN FEDERAL OR POSTAL EMPLOYERS VIOLATE OUR**	

MONEY-MANDATING STATUTES OR REGULATIONS 22

III. **WITH RESPECT TO THE NINTH CIRCUIT'S LACK OF JURISDICTION DECISION OVER AGUSTIN'S 7-11-01 NOTICE OF APPEAL** 26

CONCLUSION 30

INDEX TO APPENDIX xvii-xx

APPENDIX A (6-17-02, CA9 Memorandum) A-1

APPENDIX B (District Court's 12-7-00 Order) B-1

APPENDIX C (District Court's 12-11-00 Order) C-1

APPENDIX D (District Court's 5-23-01 Order) D-1

APPENDIX E (District Court's 6-8-01 Order) E-1

APPENDIX F (District Court's 7-11-01 Order) F-1

APPENDIX G (10-10-02, CA9 Order) G-1

APPENDIX H (Amendments I and V of the U. S. Constitution) H-1

APPENDIX I (Statutory Provisions)	I-1 to I-6
APPENDIX J-1 AND J-2 (Agustin's 2-16-95, Application for sick leave (exhibit 3 of Agustin's 12-18-96 District Court Complaint)	J-1, 2
APPENDIX J-3 AND J-4 (Navy's 2-28-95 Memorandum approving sick leave until Agustin's sick leave and annual leave accounts "become[] exhausted" (exhibit 19 of Agustin's 12-18-96 District Court Complaint)	J3, 4
APPENDIX J-5 AND J-6 (Agustin's Leave and Earnings Statement for the period ending April 29, 1995)	J-5, 6
APPENDIX J-7 TO J-9 (12-21-95, MSPB hearing records)	J-7, 8, 9
APPENDIX K-1 TO K-3 (Pages 2 and 3 of the Navy's brief ("Brief for defendant-appellee") before the Ninth Circuit)	K-1, 2, 3
APPENDIX L-1 TO L-5 (Most relevant facts)	L-1 to L-5
APPENDIX L-6 TO L-8 (Most relevant District Court Proceedings)	L-6 to L-8
APPENDIX L-9 TO L-10 (Most relevant Ninth Circuit Proceedings)	L-9 to L-10

APPENDIX M-1 to M-4 M-1 to
(Most relevant excerpts from the District Court's Civil Docket) M-4

APPENDIX M-5 to M-9 M-5 to
(Reduced copy of pages 2, 12, 13, 14 and 15 of District Court's Civil Docket) M-9

APPENDIX N N-1 to
(Agustin's 7-11-01 Notice of Appeal) N-7

TABLE OF AUTHORITIES

(NOTE: Opinions of the Ninth Circuit which are listed in this table as located at CA9 Internet Website, were quoted from: www.ca9.uscourts.gov, under "OPINIONS".)

CASES	Page
Adonican v. City of Los Angeles, CA9 No. 01-17303 (8-6-02) (page 11179 at CA9 internet website)	26, 29, 30
Alexander v. Choate, 469 U.S. 287, n. 20 (1985)	7
American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 990 (1999)	19
Ansonia v. Board of Education v. Philbrook, 479 U.S. 60, 71 (1986)	16
Arline, 480 U.S. 273, 289 n. 19	7
Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000)	10, 14, 20
BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002)	5
Blue Shield of Virginia v. McCready, 457 U.S. 465, 484 (1982)	18
Boag v. MacDougall, 454 U.S., at 365	21

Bowen v. Massachusetts,
487 U.S. 879, 905-906, n. 42 (1988) 25

Bragdon v. Abbott,
118 S. Ct. 2196, 2202 (1998) 5, 10

Buckingham v. U.S.,
998 F.2d 735 (9th Cir. 1993) 4, 7, 9, 11

Bush v. Lucas,
462 U.S. 367, 385, n. 25 (1983) 25

Cleburne v. Cleburne
Living Center, Inc.,
473 U.S. 432, 439 (1985) 23

Cleveland, 119 S.Ct., at 1602 14

Conley v. Gibson,
355 U.S. 41, 45-46 (1957) 22

Estate of Cowart v. Nicklos Drilling,
505 U.S. 469, 475 (1992) 6

FDIC v. Meyer,
510 U.S. 471, 484 (1994) 24

Flamingo Industries v.
U.S. Postal Service,
CA9 No. 01-15963 (8-23-02),
p. 12500, (CA9 Internet Website) 22, 24

Ford v. Hubbard,
CA9 No. 98-56455 (9-6-02),
page 13357 (CA9 Internet Website) 21

Gibson v. County of Washoe,
CA9 No. 99-17338 (5-22-02),
p. 7473, (CA9 Internet Website) 17

Goldberg v. Kelly,
397 U.S. 254 (1970) 19

Griffith v. Kentucky,
479 U.S. 314, 328 (1987) 13

Haines v. Kerner,
404 U.S. 519, 520 (1972) 19, 21, 26

Hambsch v. U.S.,
490 U.S. 1054, 1057 (1989) 23, 25

Harlow v. Fitzgerald,
457 U.S. 800, 818 (1982) 17

Heckler v. Ringer,
466 U.S. 602, 614 (1984) 18

Hishon v. King & Spalding,
467 U.S. 69, 75 (1984) 16

Hope v. Pelzer,
122 S.Ct. 2508, 2514 (2002) 17

Humprey v. Memorial
Hospitals Association,
239 F.3d 1128, 1136 (9th Cir. 2001) 10

In Re Liberty Construction,
9 F.3d , 800, 801 (9th Cir. 1993) 22, 25

Irwin v. Department of Veterans Affairs,
498 U.S. 89, 95 (1990) 26, 29

James M. Bean Distilling Co. v.
Georgia,
501 U.S. 529, 540 (1991) 13

Johnson v. State of California,
CA9 No. 98-55302 (03-21-00), 28
page 3317, (CA9 Internet Website) 21

Johnstone v. Horne,
875 F. 2d 1415, 1418 (9th Cir. 1989) 6, 10

Logan v. Zimmerman,
102 S.Ct. 1148, 1154 (1982) 13

Lovell v. Chandler,
CA9 No. 98-16545 (9-5-02),
page 13144, (CA9 Internet Website) 17

Mathews v. Eldridge,
424 U.S. 319 (1976) 19

Mendoza v. Zirkle Fruit Co.,
CA9 No. 01-35276 (9-3-02),
page 12974, (CA9 Internet Website) 18

Perry v. Sindermann,
408 U.S. 593, 597 (1972) 16

Pollard v. E. I. Dupont de
Nemours & Co.,
121 S. Ct. 1946, 1952 (2001) 11

Prewitt v. U. S. Postal Service,
662 F.2d 292, 306 (5th Cir. 1981) 7

Ragsdale v. Wolverine,
122 S.Ct. 1155, 1166 (2002) 20

Raygor v. Regents of University
of Minnesota,
122 S.Ct. 999, 1004 (2002) 18, 19

Russell v. U.S. Department of the Army,
191 F.3d 1016, 1020 (9th Cir. 1999) 22, 23, 24, 25

Smith v. Robinson,
468 U.S. 992, 1018 (1984) 7

Societe Internationale v. Rogers,
357 U.S. 197...(1958) 13

Southeastern Community College v.
Davis,
442 U.S. 397 (1979) 6, 7

Swierkiewicz v. Sorema N.A.,
22 S.Ct. 992, 998 (2002) 23, 24

Ulrich v. City and County
of San Francisco,
CA9 No. 01-15717 (10-11-02)
(page 9, CA9 Internet website) 16

United States v. F & M Schaefer
Brewing Co.,
356 U.S. 227, 232-34 (1958) 26, 29

United States v. Hopkins,
427 U.S. 123, 128 (1976) 25

United States v. Testan,
424 U.S. 392, 405 (1976) 22, 23, 25

U.S. v. Healy,
376 U.S. 75 (1964) 26, 27

U.S. v. Ibarra,
502 U.S. 1, 7 (1991) 26, 27

U.S. Airways, Inc., v. Barnett,
122 S.Ct. 1516, 1521 (2002) 4, 8, 11, 14

Wander v. Kaus,
CA9 01-15116 (9-20-02),
(page 14536 at CA9 Internet Website) 18

Worthington v. U.S.,
68 F3d 24, 27 (Fed. Cir. 1999) 22, 25

Young v. U.S.,
122 S.Ct. 1036, 1040-1041 (2002) 26, 29

STATUTES

5 USC Section 5596 1, 22, 23

5 USC Section 6303 1, 12, 22, 23, 24, 25

5 USC Section 6307 1, 12, 20, 22, 23, 24, 25

5 USC Sections 6382(a)(1)(D)	22, 24
5 USC Section 7701	1, 23, 24
5 USC Section 7511	1, 23
5 USC Section 7512	1, 23
5 USC Section 7513	1, 23
5 USC Section 8118(c)	1, 12, 20, 22, 23, 24, 25
5 USC Section 8147(b)	16
28 USC Section 1254(1)	1
28 USC Section 1291	3
28 USC Section 1331	3, 18
28 USC Section 1343	3
28 USC Section 1367(a)	1, 18
29 USC Section 791	1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16 18
29 USC Section 794	5, 6, 7, 8, 10
29 USC Section 794a(a)(1)	1, 4, 5, 10, 12
42 USC Section 12201(a)	1, 5

42 USC Section 12201(b)	5, 10
65 Statute 681, Section 204	1
FEDERAL REGULATIONS	
5 CFR Sections 630.401	20
5 CFR Section 630.401(a)(1),(2)	12, 16, 20, 21, 22, 23, 24, 25
5 CFR Section 402	20
5 CFR Section 403	20
5 CFR Section 831.1205(b)(1)	8, 12
29 CFR pt. 1630, App. Section 1630.2(o), p. 355 (2002)	4, 9, 12
29 CFR pt. 1630, App. Section 1630.2(o)(3), p. 355 (2002)	4, 10, 12
29 CFR pt. 1630, App. Section 1630.9, p. 361 (2002)	4, 10, 12
29 CFR pt. 1630, App. Section 1630.9, p. 362 (2002)	14
29 CFR Section 1614.203(b)	6, 9, 10

29 CFR Section 1630.1(c)(2),
p. 339 (2002) 5, 10

29 CFR Section 1630.2(o)(1)(iii),
p. 341 (2002) 4, 9, 12

29 CFR Section 1630.2(o)(3),
p. 341 (2002) 4, 9

INSTRUCTIONS

CPI 752–Navy's Civilian Personnel
Instructions (CPI) 752–
Department of the Navy
Disciplinary Actions 1

RULES

Federal Rules of Civil Procedures,
Rule 59(e) 26, 27, 29

Federal Rules of Appellate Procedures,
FRAP 4(a) 3, 26

PETITION FOR A WRIT OF CERTIORARI

At the outset, Agustin, who has honorably served this great nation for more than 26 years in times of war and peace as a Vietnam veteran and as a U.S. Navy, civilian federal employee, cries and begs that this honorable Court should grant his petition for a writ of certiorari because the instant case involves issues of momentous, national, and exceptional importance and significance to all our federal and postal employees.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the Ninth Circuit (6-17-02 Memorandum) appears at Appendix (or "App.") A-1 to A-2, and is unpublished. The opinion of the U. S. District Court (12-7-00 Order) appears at App. B-1 to B-11, and to Agustin's knowledge, is unpublished. The District Court's 12-11-00, 5-23-01, 6-8-01, and 7-11-01 Orders appear as App. C-1 to C-2, D-1 to D9, E-1 to E-4, and F-1 to F-2, respectively.

JURISDICTION

The Ninth Circuit decided Agustin's case on June 17, 2002. App. A-1 to A-2. On July 15, 2002, Agustin timely filed his "petition for rehearing and suggestion for rehearing en banc". On October 10, 2002, the Ninth Circuit ordered that: "The petition for panel rehearing and petition for rehearing en banc are denied." App. G-1. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment's constitutional right "to petition" provision and the Fifth Amendment of our U.S. Constitution. See App. H-1.

The following statutes are involved: 29 USC Sections 791(b) and 794a(a)(1); 42 USC Section 12201(b); 65 Statute 681, Section 204(a), (b); 5 USC Sections 6307(a),(b), 6303(a)(3), and 8118(c); 5 USC Section 5596(a)(1), (b)(1)(A)(i); 28 USC Section 1331; 28 USC Section 1367(a); and 5 USC Sections 7701(a), 7511(a)(1)(A), 7512, and 7513(d). See App. I-1 to I-6.

STATEMENT OF THE CASE

The instant case involved Agustin's claims that the Respondent (or "Navy"), when it disciplinary removed him from his Planner and Estimator (P&E) position through its 4-12-95 disciplinary removal action under the charge of "unavailability for duty", pursuant to the Navy's Civilian Personnel Instructions (CPI) 752--Department of the Navy Disciplinary Actions, based solely on his exercise of his FECA (Federal Employees Compensation Act) and sick leave rights or his disability, violated 29 USC Section 791 and his rights to interactive process and to "affirmative action" accommodation or reasonable accommodation, unlawfully deprived him of sick leave, and violated his constitutional rights to protection from the unconstitutional taking of his property, rights, or interests (his 252.9 hours of unused and remaining, accumulated sick leave and his constitutionally-protected, leave accrual rights or benefits pursuant to the sick leave and annual leave accrual provisions of 5 USC Sections 6307 and 6303) without just compensation, to medical care or treatment, to equal protection of the laws, and his Due Process right to continuous federal employment without violation of his statutory and regulatory rights, under our U.S. Constitution.

The most relevant facts in the instant case are described at App. L-1 to L-5; the most relevant District Court's proceedings are described at App. L-6 to L-8. The District Court has jurisdiction pursuant to 28 USC Section 1331 and 28 USC Section 1343.

The Ninth Circuit's proceedings are described at L-9 to L-10. In its brief before the Ninth Circuit, the Navy has admitted and conceded that: "**Agustin filed a notice of appeal on July 11, 2001...This Court has jurisdiction** pursuant to 28 USC Section 1291. Agustin filed his notice of appeal within sixty days of the District Court's order of June 8, 2001, denying leave to alter or amend the judgment. Therefore, **his notice of appeal is timely** under Rule 4(a)(4) of the Federal Rules of Appellate Procedure." App. K-1 (bold and underline added).

On 6-17-02, the Ninth Circuit ordered that: (1) "We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a notice of appeal within 60 days of those orders...The district court correctly denied Agustin's motions because it did not apply incorrect law or utilize erroneous facts", and (2) mystifyingly, that: "**We lack jurisdiction** to address Agustin's appeal of the district court's summary judgment because Agustin failed to file a notice of appeal within 60 days of entry of the order denying his timely, post-judgment motion". App. A-2 (bold and underline added). On 7-15-02, Agustin timely filed his "petition for rehearing and suggestion for rehearing en banc". On 10-10-02, the Ninth Circuit ordered that: "The petition for panel rehearing and petition for rehearing en banc are denied." App. G-1.

REASONS FOR GRANTING THE WRIT

In Agustin's Informal Brief filed before the Ninth Circuit, he requested review of, among others: the District Court's 12-7-00 Order; 12-7-00 Judgment; its 5-23-01, 6-8-01, and 7-11-01 Orders, and the thirteen (13) claims or issues he presented in the said Brief.

I. **WITH RESPECT TO THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S 5-23-01, 6-8-01, AND 7-11-01 ORDERS**, this Court should grant this petition for a writ of certiorari because such orders and such affirmance are in conflict with, or in violation of, among others: this Court's "basic equal opportunity goal"-case law in U.S. Airways, Inc., v. Barnett, 122 S.Ct. 1516, 1521 (2002), the Rehabilitation Act-scope of protection-case law in Buckingham v. U.S., 998 F.2d 735, 740-741, at note 3 (9th Cir. 1993), and our U.S. Constitution's Equal Protection guarantee.

The clear, plain, and unambiguous statutory language and mandate of 29 USC Section 791 granted "individuals with disabilities" statutory right to "affirmative action" accommodations; regulatory right to "interactive process" under 29 CFR Section 1630.2(o)(3), p. 341 (2002) and 29 CFR pt. 1630, App. Section 1630.9, p. 362 (2002); regulatory right to affirmative action accommodation or "reasonable accommodation" to enjoy equal benefits and privileges of employment or to enjoy equal employment opportunities under 29 CFR Section 1630.2(o)(1)(iii), p. 341 (2002), 29 CFR pt. 1630, App. Sections 1630.2(o) and 1630.2(o)(3), p. 355 (2002), and 29 CFR pt. 1630, App. Section 1630.9, p. 361 (2002); and statutory right under 29 USC Section 794a(a)(1) to a private cause of action "with respect to any complaint" for violations of such rights, and that such rights are not always limited per se to "otherwise qualified" disabled individuals, a term, phrase, or language

that is not included in 29 USC Sections 791 and 794a(a)(1). **These are genuine issues of material fact for trial, an issue of first impression--the issue of the statutory construction and interpretation of 29 USC Section 791**, which the District Court, and the Ninth Circuit, unfairly and unjustly ignored in the instant case.

29 USC Section 791 granted "greater...protection for the rights of individuals with disabilities" – "**greater" affirmative action accommodation "protection for the rights of individuals with disabilities**". See 42 USC Section 12201(b) (bold and underline added); and also see 29 CFR Section 1630.1(c)(2), p. 339 (2002). Although "[t]he directive [42 USC Section 12201(a)] requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act" neither the ADA nor 29 USC Section 794 could limit 29 USC Section 791's greater, affirmative action accommodation protection to individuals with disabilities. See Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998). The District Court's mystifying refusal or "unwillingness" (App. F-1) to interpret the statutory construction, language, and mandate of 29 USC Section 791 and its "scope of protection" (App. E-2) with respect to individuals with disabilities, the key and threshold issue in Agustin's 29 USC Section 791 affirmative action accommodation claim, based on its impermissible otherwise qualified per se rule, had very clearly violated Agustin's First Amendment-constitutional right "to petition" and this Court's right "to petition"-case law, which was reannounced in BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002).[1]

---

[1] **"[P]laintiff believes that Section 501 of the Rehabilitation Act affords employees of the government more protection than Section 504. The Court need not reach this issue, as Section 501 – whatever its scope of protection relative to Section 504 – does not provide relief to plaintiff...The Court has made clear in previous**

The District Court's refusal to interpret 29 USC Section 791 had also very clearly violated this Court's well established, statutory construction case law that "the beginning point must be the language of the statute" (Estate of Cowart v. Nicklos Drilling, 505 U.S. 469, 475 (1992), (underline added)): the pertinent "individuals with disabilities", "special needs", and "affirmative action" accommodation statutory language of 29 USC Section 791. "It is elementary that '[t]he starting point in every case involving construction of a statute is the language itself.'" Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) (citations omitted). The District Court had also violated Southwestern Community College v. Davis, 442 U.S. 397, 410-411 (1979) and Johnstone v. Horne, 875 F. 2d 1415, 1418 (9th Cir. 1989) when it refused to recognize the clear "distinction" (875 F. 2d, at 1418) between 29 USC Section 791 and 794.

Under 29 USC Section 791, "[t]he Federal Government shall become a model employer of individuals with handicaps". 29 CFR Section 1614.203(b). This greater protection includes the federal government's greater duty that "goes beyond mere nondiscrimination"--affirmative action duties and obligations to individuals with

---

Orders that plaintiff has not presented a genuine issue of material fact that he is a 'qualified handicapped...employee' or an 'otherwise qualified' disabled person." App. E-2/6-8-01 District Court Order (bold and underline added). **"Plaintiff argues in his motion that this Court's judgment was a clear error of law due to this Court's unwillingness to import into 2[9] USC Section 791 a separate and distinct 'affirmative action' cause of action that does not necessitate that the plaintiff be 'otherwise qualified'. Plaintiff's arguments are merely a repetition of the arguments in his previous ex parte motion for reconsideration. As such, under the local rules, this Court cannot consider them."** App. F-1/7-11-01 District Court Order (bold and underline added).

disabilities--which are noticeably lacking in the American with Disabilities Act (ADA) and in 29 USC Section 794. Buckingham v. U.S., 998 F.2d 735, 739 (9th Cir. 1993). Also see, accord, Prewitt v. U. S. Postal Service, 662 F.2d 292, 306 (5th Cir. 1981). "In...Davis...the Court emphasized that 504 [29 USC Section 794] does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons. 442 U.S., at 411-412." Smith v. Robinson, 468 U.S. 992, 1018 (1984). "Section 504 does not refer at all to affirmative action". Davis, 442 U.S., at 410. And it is not without significance, that Section 501 (29 USC Section 791) does not refer at all to "otherwise qualified" individual. "In Davis, we stated that 504 does not impose an 'affirmative-action obligation on all recipients of federal funds.'...it is clear from the context of Davis that the term 'affirmative action' referred to those 'changes', 'adjustments', or 'modifications' to existing programs that would be 'substantial', 442 U.S., at 410, 411, n. 10, 413, or that would constitute 'fundamental alteration[s] in the nature of a program...', id., at 410, rather than to those changes that would be reasonable accommodations." Alexander v. Choate, 469 U.S. 287, n. 20 (1985).

Under 29 USC Section 791, "affirmative action" accommodations referred to those "substantial" "changes", "adjustments", or "modifications" in federal employment, which include: (a) allowing a FECA-injured and disabled employee, such as Agustin, regardless of whether such employee is "otherwise qualified" or not, to enjoy or exercise his statutory, regulatory, constitutional Equal Protection, and substantive constitutional medical care or treatment rights: to use "sick leave due to occupational injury" (App. J-1, 2), which the Navy "cannot deny" to Agustin under our federal government's "existing policies" (Arline, 480 U.S. 273, 289 n. 19), under our existing federal laws and regulations, and under our U.S. Constitution's

Equal Protection guarantee; and/or (b) providing Agustin a legally-mandatory disability retirement counseling, prior to or upon his disciplinary removal, pursuant to 5 CFR Section 831.1205(b)(1), regardless of 29 USC Section 794's "otherwise qualified" requirement. Agustin presented four (4) proposed accommodations at Note 9 at page 12 of Agustin's Informal Brief, one of which was to: "Provide him counseling as to any other reasonable accommodation or as to disability retirement." At the time of the relevant employment decision on 4-12-95, Agustin has a constitutionally-protected right to disability retirement counseling and the Navy has a legal duty to provide Agustin such counseling, which the Navy had also very quite clearly ignored and violated.

Here, after Agustin had initiated the interactive process on 2-16-95, the Navy violated its interactive process legal duty and obligation, did not offer Agustin any affirmative action accommodation or reasonable accommodation, and has provided no evidence as to why Agustin's requested accommodation to use sick leave, or disability retirement counseling, was not an affirmative action accommodation or reasonable accommodation, or would cause undue hardship, pursuant to 29 USC Section 791. See items 7-10 at App. L-3 to L-5.

The Ninth Circuit affirmance of the District Court's orders should be reversed because it is in conflict with, or in violation of: (1) our U.S. Supreme Court's "basic equal opportunity goal"-case law in U.S. Airways, Inc., v. Barnett, 122 S.Ct. 1516, 1521 (2002), (holding that the ADA (or 29 USC Section 791) "specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodation' that are needed for those with disabilities to obtain the *same* workplace opportunities

[or the same equal employment opportunities, which include the same fair and equal, enjoyment or exercise of sick leave rights or benefits] that those without disabilities automatically enjoy"), and (2) with the Ninth Circuit's Rehabilitation Act-scope of protection case law in Buckingham v. U.S., 998 F.2d 735, 740-741, at note 3 (9th Cir. 1993) ("that the Act's requirement of reasonable accommodation is not limited to an employee's ability to function on the job...we have found nothing in the Act or its legislative history to indicate that Congress intended to limit the employer's duty of reasonable accommodation to the facilitation of employment tasks"). The above two (2) authorities are controlling authorities with respect to this claim and these authorities are the only correct interpretation that does not violate: 29 USC Section 791's greater "affirmative action" accommodation protection to "individuals with disabilities"--the greater "affirmative action" accommodation duties and obligations imposed by the said statute upon the federal government; our "model employer" (29 CFR Section 1614.203(b)) and "interactive process" regulations (29 CFR Section 1630.2(o)(3), p. 341 (2002) and 29 CFR pt. 1630, App. Section 1630.9, p. 362 (2002)); our affirmative action accommodation or "reasonable accommodation" regulations [2]; 42 USC Section

---

[2] Agustin's 29 USC Section 791 right to affirmative action accommodation or to reasonable accommodation are covered under the following, controlling regulations: 29 CFR Section 1630.2(o)(1)(iii), p. 341 (2002) ("reasonable accommodation" means "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities" (p. 341, underline added)); 29 CFR pt. 1630, App. Section 1630.2(o), p. 355 (2002) (explaining "reasonable accommodation" as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities" (p. 355, underline added)); 29 CFR pt. 1630, App.

12201(b); the "mandatory" "interactive process" and its "burden on the employer to show that a proposed accommodation will cause undue hardship"-case law in Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114, 1113 (9th Cir. 2000); the leave of absence-case law in Humprey v. Memorial Hospitals Association, 239 F.3d 1128, 1136 (9th Cir. 2001), (holding that "the ADA [or 29 USC Section 791] does not require an employee to show that a leave of absence [or sick leave] is certain or even likely to be successful to prove that it is a reasonable accommodation [or an affirmative action accommodation]"); the "handicapped employees" have statutory right to "a private cause of action for violations [of "29 USC Section 791"]"-case law in Johnston v. Horne, 875 F.2d 1415, 1418 (9th Cir. 1989), (holding that "[a] distinction exists between Section 501 of the Rehabilitation Act of 1973, 29 USC Section 791...and Section 504, 29 USC Section 794...Congress obligates federal employers under Section 791(b) to develop and implement affirmative action plans for handicapped employees and provides under Section 794a(a)(1) a private cause of action for violations");

Section 1630.2(o)(3), p. 355 (2002) (explaining that a category of reasonable accommodation are "accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities" (p. 355, underline added)); and 29 CFR pt. 1630, App. Section 1630.9, p. 361 (2002) ("reasonable accommodation requirement is best understood as a means by which barriers to...equal employment opportunity...are removed or alleviated" (p. 361 (2002), underline added)). "[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act." Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998) check; also see, accord, 29 CFR Section 1614.203(b). However, neither the ADA nor 29 USC Section 794 could limit 29 USC Section 791's "greater", affirmative action accommodation "protection for the rights of individuals with disabilities". See 42 USC Section 12201(b) and 29 CFR Section 1630.1(c)(2), p. 339 (2002).

and most important, our U.S. Constitution's Equal Protection guarantee under the equal protection component of the Fifth Amendment.

Based on the unique facts in the instant case, this Court's "basic equal opportunity goal"-case law in U.S. Airways, Inc., v. Barnett, 122 S.Ct. 1516, 1521 (2002), and the Ninth Circuit's Buckingham-scope of protection-case law are the only correct interpretations of 29 USC Section 791 that apply in the instant case and that do not "lead to the strange [and absurd] result that" violates or obliterates Agustin's and individuals with disabilities' statutory, regulatory, and constitutional rights, such as the District Court's impermissible otherwise qualified per se rule in Agustin's 29 USC Section 791 claim. See Pollard v. E. I. Dupont de Nemours & Co., 121 S. Ct. 1946, 1952 (2001).

Based on the very unique facts in the instant case, the District Court's quite mystifying, First Amendment/constitutional right "to petition"-violative and Due Process-violative refusal to interpret the pertinent statutory language of 29 USC Section 791 with respect to the "scope of protection" provided by the said statute to individuals with disabilities–the key and threshold issue in Agustin's 29 USC Section 791 claim, and its substitution of its impermissible otherwise qualified per se rule for such an interpretation, had obliterated Agustin's regulatory and statutory rights, and his constitutional rights to protection from the unconstitutional taking of his property, rights, or interests (his 252.9 hours of unused and remaining, accumulated sick leave and his constitutionally-protected, leave accrual rights or benefits pursuant to the sick leave and annual leave accrual provisions of 5 USC Sections 6307 and 6303) without just compensation, to medical care or treatment, to equal protection of the laws, and his Due Process right to continuous federal employment without

violation of his statutory and regulatory rights, under our U.S. Constitution.

Worst, in adding insult to injury, the District Court's otherwise qualified per se rule in a 29 USC Section 791 claim unambiguously divides 29 USC Section 791-disabled claimants into two discrete groups or classifications that are accorded radically disparate treatment: **A (1)** "otherwise qualified" disabled claimants who could obtain relief under 29 USC Sections 791 and 794a(a)(1), and **A (2)** non-"otherwise qualified" disabled claimants who could not obtain relief under 29 USC Sections 791 and 794a(a)(1); and **B (1)** "otherwise qualified" disabled claimants who could enjoy or exercise their rights under 5 USC Sections 6307, 6303, and 8118(c); 5 CFR 630.401(a)(1),(2); 29 CFR Section 1630.2(o)(3), p. 341 (2002) and 29 CFR pt. 1630, App. Section 1630.9, p. 362 (2002); 29 CFR Section 1630.2(o)(1)(iii), p. 341 (2002), 29 CFR pt. 1630, App. Sections 1630.2(o) and 1630.2(o)(3), p. 355 (2002), and 29 CFR pt. 1630, App. Section 1630.9, p. 361 (2002); 5 CFR Section 831.1205(b)(1); and their constitutional rights to medical care or treatment and to Equal Protection under our U.S. Constitution, and **B (2)** non-"otherwise qualified" disabled claimants who could not enjoy or exercise such rights based solely on the whim and caprice of their federal employer.

29 USC Section 791 and 794a(a)(1); or 5 USC Sections 6307, 6303, and 8118(c); or 5 CFR 630.401(a)(1), (2); or 29 CFR Section 1630.2(o)(3), p. 341 (2002) and 29 CFR pt. 1630, App. Section 1630.9, p. 362 (2002); or 29 CFR Section 1630.2(o)(1)(iii), p. 341 (2002), 29 CFR pt. 1630, App. Sections 1630.2(o) and 1630.2(o)(3), p. 355 (2002), and 29 CFR pt. 1630, App. Section 1630.9, p. 361 (2002); or 5 CFR Section 831.1205(b)(1) establishes no explicit classification and does not expressly distinguished between 29 USC Section 791-disabled claimants. Here, Agustin has suffered judicially

cognizable injuries in fact, he has standing, and he has Due Process rights to present, pursue, and maintain his constitutional-Equal Protection claims. The District Court ignored such duly presented, judicially cognizable claims, and in so doing, it has violated Agustin's Due Process rights and this Court's Due Process case law in Logan v. Zimmerman, 102 S.Ct. 1148, 1154 (1982). [3] Agustin presented these issues in **CLAIM VII** at pages 23-25 in Agustin's Informal Brief before the Ninth Circuit.

The District Court had very clearly violated Agustin's constitutional-Equal Protection right, our U.S. Constitution's Equal Protection guarantee, and our U.S. Supreme Court's Equal Protection-"equality principle" constitutional rule (which was first announced in Griffith v. Kentucky, 479 U.S. 314, 328 (1987)) "that similarly situated litigants should be treated the same, carries comparable force in the civil context...[i]ts strength is in fact greater in the latter sphere" (James M. Bean Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991)), when, after finding that "**there is no evidence that defendant engaged in an interactive process with plaintiff to find out what reasonable accommodations could have been made** [App. B-9]", the District Court then committed a quite clear, fatal error of law, and abused its discretion, when it violated our

---

[3] "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, 357 U.S. 197...(1958), for example--where a plaintiff's claim has been dismissed for failure to comply with a trial court's order--the Court read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' *Id.*, at 209". Logan, 102 S.Ct., at 1154.

"interactive process" federal regulations, defied the Ninth Circuit's "mandatory" "interactive process"-case law (Barnett, at 1114), and created and substituted its own impermissible, "special negative presumption" per se rule against Agustin, a rule which was overruled in Cleveland, 119 S.Ct., at 1602. It created its "no duty to engage in the interactive process"-per se rule, holding that "here, defendant reasonably believed no accommodation was possible based on plaintiff's statement that he was totally and permanently disabled, **there was no duty to engage in the interactive process**", without any supporting statutory, regulatory, or case law authority to such an impermissible, "no duty to engage in the interactive process"-per se rule in the interactive process jurisprudence in a 29 USC Section 791 claim, and in very clear violation of the Ninth Circuit's Barnett's "mandatory" "interactive process"-case law and this Court's affirmance of such interactive process-case law in U.S. Airways, Inc., v. Barnett, 122 S.Ct. 1516, 1521 (2002), which uphold and let remained "untouched" such interactive process-case law (id., at 1526, (JUSTICE STEVENS, concurring)). See App. B-10/12-07-00 Order (bold and underline added) and compare 29 CFR 1630, Appendix to Part 1630, Section 1630.9, p. 362 (2002). "Although **this [interactive] process** is described [] in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it **is equally applicable ...to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment**." 29 CFR 1630, Appendix to Part 1630, Section 1630.9, p. 362 (2002) (bold and underline added).

Another reason why the Ninth Circuit's affirmance of the District Court's orders should be reversed is because, in violating Agustin's constitutional equal protection right, the District Court also ignored the Navy's violation of his

substantive constitutional right to medical care or treatment, which he has also repeatedly presented during the District Court's proceedings, thus depriving him of Due Process, again. Here, the Navy has conceded to Agustin's constitutional claims (his medical care or treatment and Equal Protection constitutional violation claims) by not responding to such duly and fully presented claims throughout the District Court's and the Ninth Circuit's proceedings.

With respect to the Navy's unlawful deprivations of Agustin's sick leave rights or benefits, based on the very unique facts in the instant case, the threshold issues are: (1) *whether Agustin has statutory and regulatory rights, constitutional-Equal Protection right, and a substantive constitutional-medical care or treatment right, to use "sick leave due to occupational injury" (App.J-1, 2) after April 21, 1995 until his sick leave and annual leave accounts "become[] exhausted" (App. J-3, 4)*, not whether he was entitled to disability retirement nor to lump sump payment of sick leave; and (2) *whether he has constitutional, statutory, and regulatory rights to enjoy or exercise the same fair and equal rights, benefits, and privileges of federal employment--his FECA and/or sick leave rights or benefits--without unlawful or unconstitutional retaliation, punishment, and/or disciplinary action by his federal employer because of his exercised of such rights or his disability.*

Agustin's request to enjoy or exercise his constitutionally protected, statutory and regulatory rights *to use sick leave*--to use "sick leave due to occupational injury" (App. J-1, 2) to exercise his substantive constitutional right to medical care or treatment due to his FECA occupational injuries, pains, sufferings, and disabilities until his sick leave and annual leave accounts "become[] exhausted" (App. J-3, 4)--is *the inseparable and inextricably intertwined, 29 USC*

Section 791 affirmative action accommodation request at issue in this case. [4]

Here, the Navy's 4-12-95 action infringed or violated Agustin's substantive, constitutional right to medical care or treatment and his constitutional Equal Protection right. With respect to this claim, this claim is "based on the constitutional admonishment that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.' *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)." See Ulrich v. City and County of San Francisco, CA9 No. 01-15717 (10-11-02) (page 9, CA9 Internet website), quoting Perry v. Sindermann, which is a controlling authority with respect to this claim. Here, the Navy "denied [Agustin sick leave] benefits associated with" his federal employment "in a manner that violated his interests" in his substantive constitutional right to medical care or treatment and his constitutional Equal Protection right--constitutional rights which are granted and protected by our U.S. Constitution. See Ulrich, id. This was also presented in Note 21, at page 30, and pages 23-24, of Agustin's 12-18-96 ATTACHMENT TO APPELLANT'S INFORMAL BRIEF in the District Court. The Navy's 4-12-95 action was deliberately indifferent to Agustin's continuous

---

[4] 5 CFR Section 630.401(a) gives federal employers no discretion to deprive sick leave, and it very clearly and very expressly and explicitly commands that: "[A]n agency **must grant sick leave** to an employee when the employee--(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth". 5 CFR Section 630.401(a)(1), (2), (bold and underline added). "A provision for paid leave 'that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion...' Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)." Ansonia Board of Education v. Philbrook, 479 U.S. 60, 71 (1986).

and continuing need for medical care or treatment due to his FECA-occupational injuries, pains, and sufferings, which the Navy was fully aware of and has total and complete knowledge. See items 1 and 2 at App. L-5, and 5 USC Section 8147(b). The Navy "acted with 'deliberate indifference' to [Agustin's] health or safety...[w]e may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious". Hope v. Pelzer, 122 S.Ct. 2508, 2514 (2002) (citation omitted). Here, the Navy had no need to replace him or to fill his position (see App. J-7), and the Navy's deliberate indifference had harmed Agustin and had aggravated Agustin's FECA-injuries or conditions (see item 9 at page 8 above), and had infringed or violated his substantive constitutional right to medical care or treatment. See, accord, Lovell v. Chandler, CA9 No. 98-16545 (9-5-02), page 13144, (CA9 Internet Website); and Gibson v. County of Washoe, CA9 No. 99-17338 (5-22-02), p. 7473, (CA9 Internet Website), ("**With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eight Amendment imposes**" (bold and underline added)). Instead of allowing Agustin, a FECA-injured-in continuous and continuing pain-federal employee, to enjoy or exercise his statutory rights and his substantive constitutional right to medical care or treatment, the Navy, with deliberate indifference, threw him into the ash heap of society with no income and no medical coverage whatsoever for his FECA-injuries or handicaps, which had aggravated his FECA injuries or disabilities (see item 10 at App. L-4), and in so doing, also violated his constitutional, Equal Protection right. In the instant case, the Navy had violated Agustin's "clearly established statutory or constitutional rights of which a reasonable person would have known". Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Based on the very unique facts in the instant case, the District Court has original jurisdiction over both his sick

leave rights/benefits violations claims and his 29 USC Section 791 violations claims, which are *inseparable and inextricably intertwined* claims. "Federal courts have original jurisdiction over all civil actions that 'arise under' the Constitution or laws of the United States. See 28 USC Section 1331." Wander v. Kaus, CA9 01-15116 (9-20-02), (page 14536 at CA9 Internet Website). "[T]he [sick leave rights or benefits-violations] injury [Agustin] suffered was inextricably intertwined with the [29 USC Section 791-violations] injury". See Blue Shield of Virginia v. McCready, 457 U.S. 465, 484 (1982). Like the claims of the Medicare claimants in Heckler v. Ringer, 466 U.S. 602, 614 (1984), Agustin's claims are "inextricably intertwined". The District Court's refusal to grant Agustin a fair and full hearing of his sick leave rights/benefits violations claims, which it has original jurisdiction or supplemental jurisdiction had violated Agustin's Due Process rights, 28 USC Section 1331, or 28 USC Section 1367(a) and our U.S. Supreme Court's supplemental jurisdiction-case law in Raygor v. Regents of University of Minnesota, 122 S.Ct. 999, 1004 (2002). His claims of the Navy's violations of his sick leave rights or benefits and his claims of the Navy's violations of his rights under 29 USC Section 791 are *inseparable and inextricably intertwined* claims, both claims are "part of the same case or controversy" (28 USC Section 1367(a)), both claims "'derive from a common nucleus of operative fact' and 'comprise but one constitutional 'case'", and both claims arised "out of the same 'transaction or occurrence'" (Raygor, at 1004, citation omitted)--the Navy's one and the same April 12, 1995 punishment, retaliation, and/or disciplinary action based on Agustin's exercised of his statutory, regulatory, and constitutional rights or his disability. Also see, accord, Mendoza v. Zirkle Fruit Co., CA9 No. 01-35276 (9-3-02), page 12974, (CA9 Internet Website).

The District Court's mystifying, Due Process-violative refusal to hear his sick leave rights or benefits violations claims has made Agustin's constitutional, Due Process rights to have an opportunity to reply to, or to present such violations, and be heard, "'at a meaningful time and in a meaningful manner'"--useless and meaningless, and our U.S. Constitution's Due Process and Cases and Controversies provisions--a nullity. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quotation omitted), (underline added). Like the claimant/s in Goldberg v. Kelly, 397 U.S. 254 (1970) and in Mathews v. Eldridge, 397 U.S. 319 (1976), here, Agustin's "entitlement to [sick leave] benefits had been established", his sick leave application has been "approved" (App. 19), and he was receiving sick leave benefits from 1-23-95 to 4-21-95 (see App. 217). American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 990 (1999). "[T]he interest of [Agustin] in continued receipt of these [sick leave] benefits is a statutorily created 'property' protected by the Fifth Amendment." Mathews, id., at 332. The only way Agustin could have a true and meaningful exercise of his Due Process rights is through the full adjudication, at the same time and in the same court, of his two claims involving the Navy's violations of his sick leave rights or benefits and his 29 USC Section 791 "interactive process" and "affirmative action" accommodation claims because these two claims are **inseparable and inextricably intertwined**, because these two claims arised "out of the same 'transaction or occurrence'" (Raygor, at 1004, citation omitted)--the Navy's one and the same April 12, 1995 unjustified or unwarranted personnel action.

Here, it is quite crystal clear that the District Court has very clearly violated our U.S. Supreme Court's case law in Haines v. Kerner, 404 U.S. 519, 520 (1972), that the inartful pleadings of a pro se complainant, such as Agustin, must be

held "to less stringent standard than formal pleadings drafted by lawyers".

First, "[p]laintiff alleges...that the Navy unconstitutionally deprived plaintiff of 252.9 hours of accumulated sick leave when he was terminated, and deprived him of [his] right to use approved, accumulated sick leave for an occupational injury." App. D-3 to D-4. "**Plaintiff also states in his [12-18-96] Complaint that defendant unlawfully deprived him of sick leave**". App. D-6 (bold and underline added). Based on Webster's New Collegiate Dictionary © 1975, "unlawful" means "not lawful: ILLEGAL"; "illegal" means "not according to or authorized by law"; in the instant case, "not according to or authorized by" our sick leave law/s. Also see Note 3 at App. N-5 to N-7. Based on Agustin's filings and pleadings throughout the District Court's proceedings, he had timely and duly presented before the District Court the Navy's unlawful deprivations of his sick leave rights or benefits. Like in a request for affirmative action accommodation or reasonable accommodation, as in the Ninth Circuit's "plain English" case law in Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), in a request to use sick leave, there is no law, rule, or regulation which requires that Agustin must state the controlling law or regulation to trigger the Navy's legal duties and obligations under 5 USC Sections 6307 and 8118(c) and under 5 CFR 630.401(a)(1), (2). Like under the Family and Medical Leave Act (FMLA), under the Sick Leave Act, "[t]o trigger employer's [Sick Leave Act duties and] obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave". See Ragsdale v. Wolverine, 122 S.Ct. 1155, 1166 (2002) (Justice O'Connor, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting), and see, accord, 5 CFR Sections 630.401, 402, and 403. Here, Agustin has informed the Navy

of his reason for seeking sick leave; he has provided administratively acceptable evidence; his application for sick leave has been "approved" until his sick leave and annual leave accounts "become[] exhausted" (App. J-3, 4); it is clear and unquestionable that the Navy's Sick Leave Act duties and obligations had been triggered; that Act required that the Navy "**must grant sick leave**" (5 CFR Section 630.401(a), (bold and underline added); and that his claim "that defendant unlawfully deprived him of sick leave" (App. D-6) was before the District Court. In its 5-23-01 Order, at App. D-6, the District Court "explicitly grant[ed] summary judgment against plaintiff on all his causes of action for unlawful deprivation of sick leave" **without addressing the Navy's legal, sick leave duties and obligations, which had been triggered in the instant case,** under the controlling sick leave laws and regulations. App. D-6. See item 7 of App. L-3.

Second, "plaintiff argues that in its December 7, 2000 Order, the Court did not address **his claim that his 'unavailability for duty' due to receiving...approved sick leave could not lawfully or unconstitutionally be used by the Navy to terminate his employment**." App. D-7/5-23-01 Order (bold and underline added).

"Construing [Agustin's] inartful pleading liberally, as Haines v. Kerner [404 U.S. 519, 520 (1972)]...instructs the federal courts to do in pro se action, it states a cause of action" (Boag v. MacDougall, 454 U.S., at 365) that **the Navy violated our sick leave laws when it (1) "unlawfully deprived him of sick leave"** (App. D-6/5-23-01 Order), **and/or (2) when it "terminate[d] his employment" based on his exercised of his 5 USC Sections 6307 and 8118(c) statutory rights--his used of "approved sick leave"** (App. D-7/5-23-01 Order) **due to his FECA injuries or disabilities**. See, accord, Johnson v. State of California, CA9 No. 98-55302 (03-21-00), page 3317, (CA9 Internet Website);

and Ford v. Hubbard, CA9 No. 98-56455 (9-6-02), page 13357 (CA9 Internet Website).

After acknowledging plaintiff's claims above, at App. D-6-7, the District Court's conflicting and contrary conclusions that it "***explicitly grant summary judgment against plaintiff on all his causes of action for unlawful deprivation of sick leave*** [App. D-6]", and that "***plaintiff failed to allege these violations [of "his rights under 5 USC Section 6307 and/or FECA"] in his Complaint*** [App. D-8]", were quite mystifying, quite clear, fatal errors of fact and law against Agustin's sick leave rights/benefits deprivations/violations claims and has deprived him of his Due Process rights to a fair and full hearing and to an opportunity to present such claims and be heard. App. D-6 and 8/5-23-01 Order (bold and italics added). Here, Agustin has very clearly proven "set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. WITH RESPECT TO FEDERAL AND POSTAL EMPLOYEES' RIGHT TO A PRIVATE CAUSE OF ACTION UNDER THE BACK PAY ACT (5 USC SECTION 5596) WHEN FEDERAL OR POSTAL EMPLOYERS VIOLATE OUR MONEY-MANDATING STATUTES OR REGULATIONS, such as 5 USC Sections 6382(a)(1)(D), 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1),(2), this Court should grant Agustin's petition because the Ninth Circuit's affirmance of the District Court's orders, conflicts with, or is in violation of, United States v. Testan, 424 U.S. 392, 405 (1976); because Worthington v. U.S., 168 F3d 24, 27 (Fed. Cir. 1999) and the Ninth Circuit's case law in Russell v. U.S. Department of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999) are in conflict; because such affirmance is in conflict with, or violates, its own case law in In Re Liberty Construction, 9 F.3d , 800, 801 (9th Cir. 1993) and Flamingo Industries v. U.S. Postal Service, CA9 No. 01-

15963 (8-23-02), p. 12500, (CA9 Internet Website); and most important, because our poor federal and postal employees, for so long, and in spite of this Court's Back Pay Act-case law in United States v. Testan, 424 U.S. 392, 405 (1976), have been suffering ongoing injustice based on our federal court's continuous and continuing blind approach and blind search for waivers of sovereign immunity when federal or postal employers violate our money-mandating statutes or regulations, such as in Russell v. U.S. Department of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999). The Ninth Circuit's affirmance of the District Court's orders "do continuing damage" and injustice against our poor federal and postal employees. Hambsch, 490 U.S., at 1058. Agustin, who is a victim of such violation, cries to, and begs, this Court to put an end to such ongoing injustice based on the reasons above and/or based on this Court's quite relevant and controlling interpretation of its *expressio unius est exclusio alterius*-case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002).

The MSPB has no jurisdiction under 5 USC Sections 7701, 7511, 7512, and 7513 over the Navy's violations of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1),(2). The District Court deprived Agustin of his Due Process rights to a fair and full hearing of the merits of his sick leave rights/benefits violations claims. **With respect to Agustin's sick leave rights/benefits violations claims, like "all persons similarly situated", Agustin and all such persons have constitutional-Equal Protection right and statutory right to enjoy the same protection which the Back Pay Act (5 USC Section 5596) provides.** Cleburne, 473 U.S., at 439. In Russell v. U.S. Department of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999), that Court ignored and violated the Back Pay Act and United States v. Testan, 424 U.S. 392, 405 (1976), and did not cite "any law, rule, or

regulation" (5 USC Section 7701(a)) that gives the Board jurisdiction over violations of 5 USC Section 6382(a)(1)(D).

Russell has been overruled by this Court's relevant and controlling interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002). The Navy's April 12, 1995 violations of 5 USC Sections 6307, 6303, 8118(c), and 5 CFR 630.401(a)(1), (2) and of Agustin's rights pursuant to these authorities, was an action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (bold added). *Expressio unius est exclusio alterius.* The Civil Service Reform Act's explicit mention of "any action which is appealable to the Board under any law, rule, or regulation" excludes any action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (underline added). Concerning our U.S. Supreme Court's relevant and controlling interpretation of its *expressio unius est exclusio alterius* case law, which has overruled Russell v. U.S. Department of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999), 5 USC Sections 7701, 7511, 7512, and 7513 "do address" the very limited, enumerated actions which are appealable to the Board, "'but do not include among the enumerated actions any reference to complaints alleging'" violations of a money-mandating statute or regulation such as 5 USC Section 6382(a)(1)(D) (compare Russell), 6307, 6303, or 8118(c), or 5 CFR 630.401(a)(1), (2). See Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002), (quotation omitted).

With respect to the Navy's violations of 5 USC Sections 6307, 6303, and 8118(c) and Agustin's rights pursuant to the said statutes, the Back Pay Act is "a waiver of sovereign immunity" and the Back Pay Act "provides an avenue for relief". FDIC v. Meyer, 510 U.S. 471, 484 (1994). Also see, accord, Flamingo, id., (quoting the same case law).

See footnote 6 below for other controlling authorities concerning this issue. [5]

---

[5] "The Board's jurisdiction is not plenary, but limited to that conferred by law, rule, or regulation", and in Agustin's case, there is "no law, rule, or regulation that gives the Board jurisdiction over [Agustin's] claim[s] for violation[s] of [5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2)]". See Worthington v. U.S., 168 F3d 24, 27 (Fed. Cir. 1999), (underline added). "The statute's [Back Pay Act's] language was intended to provide a monetary remedy for wrongful reductions, removals, suspensions, and 'other unwarranted or unjustified personnel actions affecting pay or allowances'". United States v. Testan, 424 U.S. 392, 405 (1976). Any personnel action is "wrongful" "unwarranted or unjustified" if such action has violated any one of our federal statutes or regulations or any one of our U.S. Constitution's provisions, such as in Agustin's case. "Testan [United States v. Testan, 424 U.S. 392, 405 (1976)] makes clear, and our subsequent cases have reaffirmed, that the Back Pay Act itself is an explicit consent to suit by the United States as to a claim by a federal employee that the pay or emoluments of his or her position have been wrongfully withheld in violation of an 'applicable law, rule, [or] regulation'". Hambsch v. U.S., 490 U.S. 1054, 1057 (1989) (Justice O'CONNOR, with whom Justice SCALIA and Justice KENNEDY join, dissenting in the denial of the writ; STEVENS, J. respecting the denial of the writ, in this "occasion", it "is not a ruling on the merits of any question presented by the petition" Id., at 1054). Based on Testan, the Back Pay Act "'independently confer[s] jurisdiction and waive[s] sovereign immunity'" over violations of our money-mandating statutes such as 5 USC Section 6382(a)(1)(D) (compare Russell v. U.S. Department of the Army, 191 F.3d 1016, 1020 (9th Cir. 1999)), 6307, 6303, or 8118(c). See In Re Liberty Construction, 9 F.3d, at 801. "The Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States". United States v. Hopkins, 427 U.S. 123, 128 (1976). Also see, accord, Bush v. Lucas, 462 U.S. 367, 385, n. 25 (1983) and Bowen v. Massachusetts, 487 U.S. 879, 905-906, n. 42 (1988).

III. WITH RESPECT TO THE NINTH CIRCUIT'S LACK OF JURISDICTION DECISION OVER AGUSTIN'S 7-11-01 NOTICE OF APPEAL (App. N-1 to N-7), this honorable Court should grant Agustin's petition because the District Court's 12-11-00 Order (App. C-1 to C-2) was not a final order for the purpose of filing a notice of appeal, and the said decision is in conflict with, or is in violation of: FRAP 4(a)(4), this Court's case law in U.S. v. Healy, 376 U.S. 75 (1964), U.S. v. Ibarra, 502 U.S. 1, 7 (1991), and in Haines v. Kerner, 404 U.S. 519, 520 (1972), our U.S. Constitution's Due Process provision, and the Ninth Circuit's own case law in Adonican v. City of Los Angeles, CA9 No. 01-17303 (8-6-02) (page 11179 at CA9 internet website) and United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232-34 (1958) (which was quoted in Adonican). **Or, in the alternative**, this decision has very clearly violated our U.S. Supreme Court's equitable tolling case law in Young v. U.S., 122 S.Ct. 1036, 1040-1041 (2002), and in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990). Review of this decision is of exceptional importance and significance because such mystifying and quite erroneous decision affects all litigants in federal courts. See App. M-1 to M-4 for the relevant District Court docket entries.

The Ninth Circuit's opinion that it has jurisdiction over the District Court's 5-23-01, 6-8-01, and 7-11-01 orders denying Agustin's 12-11-00 Rule 59(e) motion and/or his 1-17-01 and 2-5-01 motions for reconsideration of the District Court's 12-7-00 summary judgment ***based on Agustin's 7-11-01 Notice of Appeal***, but that it lacked jurisdiction ***over the same 7-11-01 Notice of Appeal*** of the District Court's 12-7-00 summary judgment, has no support or basis whatsoever in any one of our laws, rules, regulations, or case laws, and was a quite crystal clear: error of law, abuse of discretion, and a mockery of justice. See App. A-1 to A-2.

The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings by ignoring, defying, and violating the above mentioned authorities through its unfair, unlawful, and/or Due Process-violative, piece meal, selective judicial review of Agustin's claims as to call for an exercise of this Court's supervisory power. This is another reason why this Court should grant this petition for a writ of certiorari. Fundamental fairness, Due Process, and justice require that either the Ninth Circuit has jurisdiction over Agustin's case, which require review of all his duly presented claims, or it lacked jurisdiction over his case, including the District Court's 5-23-01, 6-8-01, and 7-11-01 Orders. It is quite unfortunate that the District Court and the Ninth Circuit could ignore and defy our laws, case laws, and our U.S. Constitution, and Agustin has to come before this Court to try his last and only chance to obtain justice. Without review and supervision from this Court, how else could all our poor federal and postal employees, including Agustin, put a stop to the continuing harm and damage being done against them and obtain justice?

Agustin's timely, 12/11/00 motion (see App. M-1) was a timely filed, Rule 59(e) motion to alter or amend judgment, and pursuant to FRAP 4(a)(4), the 60-days notice of appeal filing period did not begin to run until after the District Court's 5/23/01 Order, at the earliest. Based on the District Court's 12/11/00 Order (App. C-1 to C-2), whether this Court construe his 12/11/00 motion as a Rule 59(e) motion or as a motion for reconsideration, at this point in time on 12/11/00, it is quite crystal clear that there was no final disposition or judgment "on the claims Agustin believes to be outstanding" (App. C-2), the District Court has ordered the defendant to respond to Agustin's 12/11/00 motion, and the Navy responded on 2/16/01. The District Court declared on 5/23/01 that after the Court "issued judgment" on 12/7/00, "[p]laintiff then moved this Court to

withdraw the judgment, and **that motion is now before the Court**." App. D-3/District Court's 5-23-01 Order (bold and underline added). See App. M-1 to M-3.

Agustin's quite clear intention "to preserve" (App. C-1) his appeal rights and to seek appellate review of the District Court's 12/7/00 judgment was quite manifest. To further protect his appeal right, he filed his 2/5/01 motion ("in case this motion is denied, ***plaintiff is filing this document as plaintiff's notice of appeal of this court's 12/7/00 judgment***" (2/5/01 motion, (bold and italics added); see App. M-2 to M-3).

"[I]t is better that all...motions [for reconsideration] be subsumed under one general rule—the rule laid down in Healy [U.S. v. Healy, 376 U.S. 75 (1964)]" that a motion for reconsideration "renders an otherwise final decision of a district court not final until it decides the" motion. U.S. v. Ibarra, 502 U.S., at 7, 6.

Additionally, the Ninth Circuit's lack of jurisdiction decision should be reversed because it has made Agustin's constitutional, Due Process rights to have an opportunity to reply to the District Court's 12/7/00 judgment, and be heard, useless and meaningless, and our U. S. Constitution's Due Process provision, a nullity. Furthermore, another reason why the Ninth Circuit's lack of jurisdiction decision should be reversed is because: (1) **even the Navy has admitted that Agustin's July 11, 2001 notice of appeal "is timely"** (App. K-1) (bold and underline added); also see App. K-2 and 3; and (2) because even the District Court has correctly noted Agustin's timely-filed notice of appeal and had directed him "to perfect his appeal" (App. F-2) by paying the filing fee. See App. M-4.

Or, in the alternative, even assuming arguendo that Agustin's 12/11/00 motion was not a Rule 59(e) motion but a motion for reconsideration, his 12/11/00, 1/17/01, or 2/5/01 motion equitably tolled the deadline for filing the notice of appeal of the District Court's 12/7/00 judgment in the instant case. The Ninth Circuit's lack of jurisdiction decision, is in conflict with, or has violated, our U.S. Supreme Court's equitable tolling case law in Young v. U.S., 122 S.Ct. 1036, 1040-1041 (2002), and in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990).

Furthermore, based on the District Court's 12-11-00 and 5-23-01 Orders, the Ninth Circuit's lack of jurisdiction decision is in conflict with, or in violation of, United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232 (1958) and Adonican because the District Court's 12-11-00 Order was not a "final" order for the purpose of filing a notice of appeal, it does not contain "a full adjudication of the issues at bar" and it "clearly evidences the judge's intention that it" is not "the court's final act in the matter". Adonican, id.

In its 5-23-01 Order [6], the District Court amended its 12-7-00 Judgment and "**DENI[ED] plaintiff's [12-11-00] motion to withdraw the Judgment**" (App. D-8). On 7-11-01, Agustin filed his Notice of Appeal (App. N-1 to N-7). Based on United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232 (1958), Adonican, and the District Court's 12-11-00

---

[6] "**On December 11, 2000 the Court received plaintiff's request for clarification of the December 7, 2000 Order, and his motion to withdraw the Judgment of the same date** (App. D-1)...**that motion is now before the Court** (App. D-3)...**the Court hereby CLARIFIES its Order of December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000** (App. D-8)." District Court's 5-23-01 Order, at (App. D-1, 3, and 8) (bold and underline added).

and 5-23-01 Orders, the District Court's 12-11-00 Order (App. C-1 to C-2) was not a final order for the purpose of filing a notice of appeal, and that Agustin's 7-11-01 Notice of Appeal of the 12-7-00 summary judgment was timely filed. In his 8-12-02 judicial notice filing, Agustin has timely and duly presented before the Ninth Circuit this conflict between Adonican and its lack of jurisdiction decision in the instant case, or its violation of its own case law in Adonican in this case, but to no avail. See App. L-10.

Based on the clear and indisputable facts and records in the instant case, Agustin has done everything he could "to protect" (App. N-2) and "to preserve" (App. C-1) his constitutionally-protected appeal right. And because of the momentous, national, and exceptional importance and significance of the issues involved in this case, the manifest injustice in this case should not be allowed to stand by this honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, through, and with help and assistance from friends,

REMIGIO I. AGUSTIN, Petitioner, pro se
169 Austin Avenue
Hayward, California 94544
Tel. No. (510)-786-2819

INDEX TO APPENDIX

APPENDIX (or "App.")

NINTH CIRCUIT'S OPINION:

A-1 to A-2 Ninth Circuit's 6-17-02 Memorandum.

DISTRICT COURT PROCEEDINGS:

B-1 to B-11 District Court's 12-7-00 Order.

B-12 District Court's 12-7-00 Judgment.

C-1 to C-2 District Court's 12-11-00 Order.

D-1 to D-9 District Court's 5-23-01 Order.

E-1 to E-4 District Court's 6-8-01 Order.

F-1 to F-2 District Court's 7-11-01 Order.

NINTH CIRCUIT'S ORDER ON REHEARING

G-1 Ninth Circuit's 10-10-02 Order denying rehearing.

CONSTITUTIONAL PROVISIONS:

H-1 Amendments I and V of the U. S. Constitution

STATUTORY PROVISIONS:

I-1 29 USC Section 791(b)

I-1 to I-2 29 USC Section 794a(a)(1)

I-2	42 USC Section 12201(b)
I-2	65 Statute 681, Section 204(a), (b)
I-3	5 USC Sections 6307(a),(b)
I-3	5 USC Section 6303(a)(3)
I-3	5 USC Section 8118(c)
I-3 to I-4	5 USC Section 5596(a)(1), (b)(1)(A)(i)
I-4	28 USC Section 1331
I-4 to I-5	28 USC Section 1367(a)
I-5	5 USC Section 7701(a)
I-5	5 USC Section 7511(a)(1)(A)
I-5 to I-6	5 USC Section 7512
I-6	5 USC Section 7513(d)

OTHER MATERIALS PURSUANT TO RULE 14.1(i)(vi):

EXHIBITS BEFORE THE DISTRICT COURT:

J-1	Agustin's 2-16-95 Application for sick leave (exhibit 3 of Agustin's 12-18-96 District Court Complaint)
J-2	Reduced copy of Agustin's 2-16-95 Application for sick leave

J-3 Navy's 2-28-95 Memorandum approving sick leave until Agustin's sick leave and annual leave accounts "become[] exhausted" (exhibit 19 of Agustin's 12-18-96 District Court Complaint)

J-4 Reduced copy of the Navy's 2-28-95 Sick Leave Approval MEMORANDUM

J-5 Agustin's Leave and Earnings Statement for the period ending April 29, 1995, which shows that on April 21, 1995, the effective date of his disciplinary removal, he has 252.9 hours of accumulated sick leave and 444.8 hours of accumulated annual leave (attached to Agustin's 4-27-99 Cross Motion for Summary Judgment filed with the District Court)

J-6 Reduced copy of Mr. Agustin's Leave Earnings Statement for the period ending April 29, 1995

J-7 12-21-95 MSPB hearing records (from J-8 and J-9 below)

J-8 to J-9 Reduced copy of the two, relevant pages from the 12-21-95 MSPB's hearing records

EXCERPT PAGES FROM THE NAVY'S BRIEF BEFORE THE NINTH CIRCUIT

K-1 Quote from pages 2 and 3 of the Navy's brief ("BRIEF FOR DEFENDANT-APPELLEE") before the Ninth Circuit with

respect to the timeliness of Agustin's 7-11-01 Notice of Appeal

K-2 to K-3 Page 2 (K-1) and Page 3 (K-2) of "BRIEF FOR DEFENDANT-APPELLEE" before the Ninth Circuit

MOST RELEVANT FACTS

L-1 to L-4 Most relevant facts in the instant case

MOST RELEVANT DISTRICT COURT PROCEEDINGS

L-4 TO L-6 Most relevant District Court Proceedings

MOST RELEVANT NINTH CIRCUIT COURT PROCEEDINGS

L-6 to L-8 Most relevant Ninth Circuit Court Proceedings

MOST RELEVANT EXCERPTS FROM DISTRICT COURT'S CIVIL DOCKET

M-1 to M-4 Most relevant entries from the District Court's Civil Docket

M-5 to M-9 Reduced copy of CIVIL DOCKET, pages 2 (M-5), 12 (M-6), 13 (M-7), 14 (M-8), and 15 (M-9), respectively.

AGUSTIN'S JULY 11, 2001 NOTICE OF APPEAL

N-1 to N-7 Agustin's 7-11-01 Notice of Appeal

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REMIGIO I. AGUSTIN,
Plaintiff-Appellant

v.

JOHN H. DALTON, Secretary, U.S. Dept. of the Navy,
Defendant-Appellee.

No. 01-16364
DC No. CV-96-04527 DLJ

MEMORANDUM [1]

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Submitted June 10, 2002 [2]

Before: O'SCANNLAIN, BERZON, and RAWLINSON, Circuit Judges.

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fec. R. App. P. 34(a)(2).

Remigio I. Agustin appeals pro se the district court's orders denying his motions to reconsider summary judgment for the Navy in Agustin's employment discrimination action, and we affirm.

We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a notice of appeal within 60 days of those orders. *See Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5. F3d 1255, 1262 (9th Cir. 1993). We lack jurisdiction to address Agustin's appeal of the district court's summary judgment because Agustin failed to file a notice of appeal within 60 days of entry of the order denying his timely, post-judgment tolling motion. *See* Fed. R. App. P. 4(a)(1)(B); 4(a)(4)(A)(iv) (2002); *Webb v. Ada County*, 285 F.3d 829, 836 (9th Cir. 2002).

We review the district court's denial of Agustin's motions to reconsider for an abuse of discretion. *ACandS, Inc.*, 5 F.3d 1255 at 1262. The district court correctly denied Agustin's motions because it did not apply incorrect law or utilize erroneous facts. See id.

Agustin's motions to present additional citations, to withdraw additional citations, and to supplement the record are granted. Agustin's motion to stay further action is denied as unnecessary.

AFFIRMED.

APPENDIX B

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed Dec 07 2000

On October 25, 1999, the Court ordered supplemental briefing from both parties with regard to the 1999 Supreme Court decision of Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999), to address the change in the law controlling the Court's prior grant of summary judgment to defendant in this case. Having considered the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiff's motion for reconsideration.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiff Remigio Agustin was employed as a machinist at the Alameda Naval Aviation Depot. [1] On December 14, 1993, plaintiff sustained an on-the-job injury. Plaintiff filed a claim for Federal Employees Compensation Act (FECA) benefits on January 3, 1994. On April 20, 1994, plaintiff was granted partial benefits, and his absence from duty was approved. Plaintiff's benefits were later suspended and this remains the subject of a separate lawsuit before this Court.

On February 10, 1995, the Navy issued to plaintiff an Advance Notice of Proposed Separation from employment based on plaintiff's apparent permanent total disability and resultant unavailability for duty. On April 12, 1995, the Navy separated plaintiff from employment.

After a series of administrative actions, plaintiff filed his complaint in the instant case on December 18, 1996. In that complaint, plaintiff alleged that the Navy discriminated against him on the basis of disability, in violation of the Rehabilitation Act of 1973, 29 USC Section 791 et. Seq., and that the Navy retaliated against him, in violation of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000e et seq. On August 9, 1999, the Court entered summary judgment against plaintiff and in favor of defendant on all claims. See Order of August 9, 1999.

---

[1] Plaintiff was a Machinist Supervisor II, but was downgraded, without loss of pay, to the position of Planner and Estimator (P&E) as a result of a base-wide reduction in force ("RIF") in January 1994. The downgrading of plaintiff's position was the subject of the related case of Agustin v. Dalton, C-96-2154 DLJ. The Court granted summary judgment for the defendant in that case on October 6, 1997. The Ninth Circuit has now affirmed the Court's order.

On August 18, 1999, plaintiff filed a Motion for Leave to File a Motion for Reconsideration of the Court's August 9, 1999 Order. Plaintiff argued that the Supreme Court's decision in Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)—a case decided after both parties had submitted their summary judgment briefs—obligated the Court to reconsider its grant of summary judgment to defendant on the Rehabilitation Act claim. The Court construed plaintiff's motion to reconsider as a motion pursuant to Federal Rule of Civil Procedure 59(e).

B. Legal Standard

1. F. R. C. P. 59(e) - Motion for Reconsideration

"Under [Federal Rule of Civil Procedure] 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999) (citing Schoold Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993)).

Rule 59(e) motions may not be used to raise arguments that could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance. See Pacific Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (citing Russell v. Delco Remy Div. of Gen. Motors Corp., 51 F.3d 746, 749 (7th Cir. 1995); Concordia College Corp. v. W. R. Grace & Co., 999 F.2d 326, 330 (8th Cir. 1993); FDIC v. World Univ.,

Inc., 978 F.2d 10, 16 (1st Cir. 1992); Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990).

2. Rehabilitation Act

The standard a party must meet to establish a violation of the Rehabilitation Act is the same as that required under the Americans with Disabilities Act (ADA). See Doe v. Univ. of Maryland Med. Sys. Corp., 50 F.3d 1261, 1264 (4th Cir. 1995); see also Zukle v. Regents of the Univ. of California, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999). In order to qualify for relief under the ADA, the plaintiff must show that: (1) she is a disabled person within the meaning of the statute; (2) she is qualified, with or without reasonable accommodation, to perform the essential functions of the job she holds or seeks; and (3) that she suffered an adverse employment action because of her disability." Braunling v. Countrywide Home Loans Inc., 220 F.3d 1154, 1156 (9th Cir. 2000).

3. Summary Judgment

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact", the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or

as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" T. W. Elec. Service, Inc. v. Pacific Elec. Constractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. T. W. Electric, 809 F.2d at 630 (citing Celotex, 477 U.S. at 323); Kaiser Cement, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. See T. W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)); see also Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991).

II. DISCUSSION

Upon reconsideration, the Court finds that its grant of summary judgment to the Navy in this case was proper, recent changes in disability law notwithstanding. The Court therefore DENIES plaintiff's motion to reconsider for the reasons stated below.

A. The Effect of Cleveland v. Policy Management Systems Corp.

Plaintiff argues that the Court's August 9, 1999 summary judgment Order must be reconsidered in light of Cleveland v. Policy Management Systems Corp., 526 U.S.

795 (1999). According to plaintiff, the order relief upon a "special negative presumption" that when a plaintiff states his or her complete disability in the course of applying for disability benefits, he or she is also presumed to be completely disabled for purposes of the Rehabilitation Act and, therefore, it can be safely assumed that no reasonable accommodation exists whereby plaintiff would be enabled to perform the essential functions of his or her job. Plaintiff believes that this type of presumption is prohibited after the Cleveland case.

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) concerned a plaintiff's application for Social Security Disability Insurance (SSDI) and her contemporaneous suit under the Americans with Disabilities Act (ADA). Cleveland, 526 U.S at 802. Cleveland holds that the "pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA." Id. at 797-98. Specifically, Cleveland stands for the proposition that a plaintiff's claim in one context that she is totally disabled and therefore entitled to benefits is not necessarily inconsistent with a claim in another context that she can perform the essential functions of her job with or without reasonable accommodation. See id. at 807. According to Cleveland, such statements can be consistent with each other because of the different ways statutes define qualified individuals and whether reasonable accommodations are considered. See id. at 802-04.

In Cleveland the Supreme Court did recognize that in some cases the contradictory statements will act to cancel out an essential element of a claim, for instance that the plaintiff can perform the essential functions of the job. See

id. at 804. Thus the Supreme Court held that a plaintiff claiming she can perform the essential functions of her job under one statute "cannot simply ignore the apparent contradiction that arises out of the earlier...total disability claim. Rather, she must proffer a sufficient explanation [for the discrepancy]." Id. at 806. The Court went on to outline the explanation needed to defeat a motion for summary judgment:

> that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions of her job, with or without 'reasonable accommodation.'

Id.

In the instant case, plaintiff has repeatedly attested to being completely, permanently disabled. In a September 23, 1994 statement to the Navy, plaintiff declared that he was "permanently totally disabled because of [his] physical and psychiatric condition." See Kamlet Decl., Ex. F (Response from Employee to Form CA-35A). In his July 29, 1995 application for disability retirement, in response to a question asking what efforts his employer had made to accommodate him, plaintiff stated "none" because he "was and is totally disabled." Id., Ex. K. Plaintiff further stated that he "could not perform is job..." Id. Finally, during this litigation, in a deposition taken on April 8, 1998, plaintiff testified that there has never been a time since January 1994 when he has been capable of working; that, from September 1994 to the present, he continuously considered himself permanently and totally disabled; that he could not recall whether he ever asked defendant to accommodate his

disability by assigning him to other duties; and that he does not believe that there were any duties he was capable of performing at the Depot, with or without accommodation, as a result of hi disability. See id., Ex. L (Agustin Depo.) at 24:3-5; 27:16-21; 29:18-30:15.

It is the first two statements which arguably fall within the ambit of Cleveland, as they appear to be made for the purposes of disability benefits. The Court notes that Cleveland does not stand for the proposition that statements of this sort must be disregarded entirely for purposes of the ADA or Rehabilitation Act. Rather, under Cleveland, plaintiff must be given an opportunity to explain how, assuming the truth of these statements, he could nonetheless perform the essential functions of his job. See Cleveland, 526 U.S. at 807. Here, plaintiff has not proffered any explanation for how he could perform the essential functions of his job with accommodation while at the same time being totally and permanently disabled. In fact, the inconsistency between plaintiff's statements is not unlike the inconsistency identified by the Cleveland Court in statements "such as 'The light was red/green,' or 'I can/cannot raise my arm above my head.'" 526 U.S. at 802. This type of absolute inconsistency, the Cleveland Court made clear, can never be cured by the explanation of a plaintiff. Id. Even in the wake of Cleveland, then, there is no issue of material fact with respect to whether plaintiff was "otherwise qualified" within the meaning of the Rehabilitation Act, because plaintiff has consistently maintained – from the time of injury, through the period when he was separated, and through most of the present litigation – that he was and is totally and permanently disabled.

B. The effect of Barnett v. U.S. Air, Inc.

Plaintiff further emphasizes that the Navy failed to engage in an interactive process with him to explore what accommodations might be made to his disability. Under Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000), plaintiff argues, such a failure precludes the grant of summary judgment for defendant.

In Barnett, the Ninth Circuit found the requirement that employers engage in an interactive process in good faith under the ADA (and the Rehabilitation Act) to be mandatory and not permissive. Barnett, 228 F.3d at 1114. The court held that "employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." Id. at 1116. The Court further held "that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process." Id. In Barnet, plaintiff triggered the interactive process obligation by commuting to U.S. Air his desire for accommodation, and identifying three possible accommodations. Id. U.S. Air rejected each of these proposed accommodations in a letter five months later. Id. The Court found that the delay and the failure to communicate did not reflect good faith engagement in the interactive process, and reversed the trial court's grant of summary judgment to U.S. Air. Id.

The Court notes that in the instant case there is no evidence that defendant engaged in an interactive process with plaintiff to find out what reasonable accommodations could have been made. However, even Barnett--which makes the interactive process mandatory under a relatively broad spectrum of circumstances—does not mandate the interactive process where as in this case, an employee states

his complete inability to work. The Barnett court makes it clear that "employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." Id. at 1116, emphasis added. Where, as here, defendant reasonably believed no accommodation was possible based on plaintiff's statement that he was totally and permanently disabled, there was no duty to engage in the interactive process. As a matter of common sense, Barnett cannot require an employer to initiate and engage in the interactive process even where, based on the employee's representations, it is clear that the process would be fruitless.

Plaintiff argues that his proposal of four "reasonable" accommodations put the Navy on notice that he could have been reasonably accommodated. [2] However, the Court notes that there does not appear to be any evidentiary support that the accommodations set forth in the course of this litigation were brought to the attention of the Navy before plaintiff's separation from employment.

III. CONCLUSION

For the foregoing reasons, the Court hereby DENIES plaintiff's motion for reconsideration. For the reasons stated in this Order and in the Court's Order of August 9, 1999, the

---

[2] These accommodations are: (1) to be placed on extended sick leave in order to recuperate and return to work; (2) to hold his removal in abeyance until exhaustion of his available sick leave, so that he might recuperate and return to work; (3) to offer him a medical examination to determine reasonable accommodation; or (4) to provide him counseling as to any other reasonable accommodation or disability retirement. See Plaintiff's Supp. Brief for Motion to Alter or Amend Judgment at 31-32.

Court GRANTS summary judgment for defendant on all claims.

IT SO ORDERED.

Dated: December 7, 2000.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX B

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

JUDGMENT
Filed Dec 07 2000

Pursuant to the Court's Order issued on December 7, 2000, the Court hereby enters judgment on behalf of defendant JOHN A. DALTON, Secretary, Department of Navy, and against plaintiff, REMIGIO I. AGUSTIN.

IT IS SO ADJUDGED

Dated: December 7, 2000

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX C

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed Dec 11 2000

On December 7, 2000, the Court issued an Order denying plaintiff's motion for reconsideration and granting summary judgment for defendant on all claims. See Order of December 7, 2000. On the same date, the court issued a separate judgment in favor of defendant and against plaintiff. See Judgment of December 7, 2000. On December 11, 2000 the Court received plaintiff's request for clarification of the December 7, 2000 Order, and his motion to withdraw the Judgment of the same date. In this document plaintiff outlines certain claims he believes were not but should have been addressed by the Court, and asks that the Court withdraw the Judgment until these claims are addressed, in order to preserve his time to appeal the judgment to the Ninth Circuit Court of Appeals.

The Court declines to withdraw the Judgment at this time. However, the Court hereby requests that defendant

submit a response to plaintiff's filing, explaining its position on the claims plaintiff believes to be outstanding. Defendant shall file its response within THIRTY DAYS. After receipt of defendant's response, the Court may choose to hold a status conference to examine the status of this case.

IT IS SO ORDERED.

Dated: December 11, 2000

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX D

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed May 23 2001

On December 7, 2000, the Court issued an Order denying plaintiff's motion for reconsideration, and granting summary judgment for defendant on all claims. See Order of December 7, 2000. On the same date, the Court issued a separate judgment in favor of defendant and against plaintiff. See Judgment of December 7, 2000. On December 11, 2000 the Court received plaintiff's request for clarification of the December 7, 2000 Order, and his motion to withdraw the Judgment of the same date. This motion outlined certain claims plaintiff believed the Court had not addressed when granting summary judgment to defendant. The Court declined to withdraw the Judgment, but requested that defendant submit a response to plaintiff's filing.

The Court has now received defendant's response and, for the reasons stated below, CLARIFIES its Order of

December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiff Remigio Agustin was employed as a machinist at the Alameda Naval Aviation Depot. [1] On December 14, 1993, plaintiff sustained an on-the-job injury. Plaintiff filed a claim for Federal Employees Compensation Act (FECA) benefits on January 3, 1994. On April 20, 1994, plaintiff was granted partial benefits, and his absence from duty was approved. Plaintiff's benefits were later suspended and this remains the subject of a separate lawsuit before this Court (C-98-4418 DLJ).

On February 10, 1995, the Navy issued to plaintiff an Advance Notice of Proposed Separation from employment based on plaintiff's apparent permanent total disability and resultant unavailability for duty. On April 12, 1995, the Navy separated plaintiff from employment.

After a series of administrative actions, plaintiff filed his complaint in the instant case on December 18, 1996. In that complaint, plaintiff alleged that the Navy discriminated against him on the basis of disability, in violation of the

---

[1] Plaintiff was a Machinist Supervisor II, but was downgraded, without loss of pay, to the position of Planner and Estimator (P&E) as a result of a base-wide reduction in force ("RIF") in January 1994. The downgrading of plaintiff's position was the subject of the related case of Agustin v. Dalton, C-96-2154-DLJ. The Court granted summary judgment for the defendant in that case on October 6, 1997. The Ninth Circuit has now affirmed the Court's order.

Rehabilitation Act of 1973, 29 USC Section 791 et seq., and that the Navy retaliated against him, in violation of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000e et seq. On August 9, 1999, the Court entered summary judgment against plaintiff and in favor of defendant on all claims. See Order of August 9, 1999.

On August 18, 1999, plaintiff filed a Motion for Leave to File a Motion For Reconsideration of the Court's August 9, 1999 Order. Plaintiff argued that the Supreme Court's decision in Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)—a case decided after both parties had submitted their summary judgment briefs—obligated the Court to reconsider its grant of summary judgment to defendant on the Rehabilitation Act claim. The Court construed plaintiffs motion to reconsider as a motion pursuant to Federal Rule of Civil Procedure 59(e), and ordered supplemental briefing on Cleveland from both parties. See Order of October 25, 1999. The Court received supplemental briefing, and additional filings from plaintiff which brought to the Court's attention the recent Ninth Circuit case of Barnett v. U.S. Air, Inc., 228 F.3d1105 (9th Cir. 2000). Plaintiff's motion to reconsider was denied by Order of December 7, 2000. On the same date, the Court issued judgment in favor of defendants. Plaintiff then moved this Court to withdraw the judgment, and that motion is now before the Court.

II. DISCUSSION

Plaintiff argues that the Orders of the Court granting summary judgment for defendants in this case failed to consider four claims contained in plaintiff's Complaint. Plaintiff alleges that these claims are as follows. First, that the Navy unconstitutionally deprived plaintiff of 252.9 hours of accumulated sick leave when he was

terminated, and deprived him of right to use approved, accumulated sick leave for an occupational injury. Second, that the manual and procedures the Navy employed to discipline and remove plaintiff violated plaintiff's right under the Rehabilitation Act ("the Act") not to suffer disparate treatment and disparate impact discrimination under section 504 of the Act and deprived him of the Rehabilitation Act's affirmative action protection under section 501 of the Act. Third, that the Navy violated plaintiff's Due Process rights by using his unavailability for duty while receiving FECA benefits and/or approved sick leave as a reason to terminate his employment. Fourth, that plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA.

The government makes the general response that all claims over which this Court has jurisdiction have already been adjudicated. Specifically, it argues that to the extent that plaintiff argues that the Navy should have allowed him to exhaust his accumulated sick leave as a reasonable accommodation under the Rehabilitation Act, that claim has been adjudicated. To the extent that plaintiff claims that the Navy's refusal to allow plaintiff to exhaust accumulated sick leave before terminating his employment was otherwise unlawful, plaintiff cites no statute or regulation that supports his claim. Finally, other than the Rehabilitation Act, plaintiff fails to identify an independent jurisdictional basis for this Court to consider plaintiff's loss of accumulated sick leave upon termination from employment.

A. Unconstitutional Deprivation of Sick Leave

Plaintiff first argues that this Court ignored his claim against the Navy for unlawful deprivation of some 252.9

hours of accumulated sick leave and his statutory and constitutional rights to use that leave. [2]

In his complaint, plaintiff alleges that both of these deprivations occurred as a result of the Navy denying him due process of law, i.e. terminating his employment in retaliation for his exercise of his FECA and TITLE VII rights, because he was disabled, and because of his national origin. See Complaint of December 18, 1996 ("Complaint") at 27. Therefore, in order to recover for either alleged violation of his due process rights, plaintiff must prove (1) retaliation for asserting his FECA rights or his Title VII rights, (2) a violation of the Rehabilitation Act, or (3) national origin discrimination under Title VII.

1. Retaliation for Assertion of FECA and Title VII

In Agustin v. Dalton, C-96-2154 DLJ, this Court granted summary judgment against plaintiff on his claim for retaliation based on the exercise of his rights under FECA. See Order of Oct. 6, 1997 at 5-6. In its Order of August 9, 1999, this Court explicitly found plaintiff's claim for retaliation in violation of Title VII to be without evidentiary support. Therefore, the Court finds that neither of these alleged violations could have led to an illegal deprivation of plaintiff's sick leave. See Order of Aug. 9, 1999 at 11-12.

2. Discrimination Under the Rehabilitation Act

---

[2] Plaintiff also complains that in its December 7, 2000 Order, the Court did not rule on his claim of the Navy's unconstitutional taking of his sick leave. However, a review of his December 18, 1996 complaint reveals that plaintiff never asserted such a claim against defendant. Therefore, the Court cannot adjudicate any such claim.

Plaintiff also states in his Complaint that defendant unlawfully deprived him of his sick leave by terminating him in violation of section 501 and 504 of the Rehabilitation Act. Complaint at 30.

In order to make out a prima facie case of violating the Rehabilitation Act under either sections 501 or 504, a plaintiff must show is that he was an "otherwise qualified" disabled person for the purposes of the Act. See Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987). In its Order of August 9, 1999, this Court found that "plaintiff cannot possibly show that he is an 'otherwise qualified' disabled person as required by the Rehabilitation Act." Order of Aug.9, 1999 at 7. Therefore plaintiff cannot recover for any deprivation allegedly resulting from a violation of the Rehabilitation Act.

3. Discrimination Based on National Origin

In its Order of August 9, 1999, this Court explicitly found that plaintiff's claim of national origin discrimination was without evidentiary support. See Order of Aug. 9, 1999 at 11-12. Therefore, no illegal deprivation of plaintiff's sick Leave could have occurred as the result of such discrimination.

Because all four bases for plaintiff's claim for unlawful deprivation of his sick leave have been found by this Court to be unfounded, the Court CLARIFIES its Order of December 7, 2000 to explicitly grant summary judgment against plaintiff on all his causes of action for unlawful deprivation of sick leave.

B. Whether the Manuals and Procedures Used to

Terminate Plaintiff Violated Plaintiff's Rights under the Rehabilitation Act's Prohibition of Disparate Treatment.

Second, plaintiff argues that the Court failed to rule on his claim that the instructions, procedure, or manual used by the Navy to terminate him deprived him of his property interest in his employment without due process in violation of sections 501 and 504 of the Rehabilitation Act.

As previously mentioned, the Court has ruled that plaintiff has failed to demonstrate any violation of the Rehabilitation Act. Therefore, the Court CLARIFIES that its Order grants summary judgment against him for any claim that the Navy's manuals and procedures used to terminate plaintiff violated plaintiff's rights under the Rehabilitation Act's prohibition of disparate treatment.

B. Defendant's Use of Plaintiff's "Unavailability for Duty" under CPI 752 to Terminate his Employment

Third, plaintiff argues that in its December 7, 2000 Order, the Court did not address his claim that his "unavailability for duty" due to receiving FECA benefits and/or approved sick leave could not lawfully or unconstitutionally be used by the Navy to terminate his employment. In his Complaint, plaintiff alleges that two Navy regulations were improperly used to terminate his employment, CPI 752 (reasons for disciplining an employee) and CPI 339 (physical requirements of employees). Specifically, plaintiff claims that the Navy violated CPI 752 because it did not make a reasonable accommodation to him by allowing him to use his sick leave to recover from his disability. See Complaint at 31 ("To discipline appellant simply because he is temporarily totally disabled is

prohibited discrimination and cannot be supported by law or logic.").

As noted above and contrary to the assertion in his complaint, plaintiff informed defendant numerous times that he was permanently and totally disabled, not temporarily totally disabled. See Order of Aug. 9, 1999 at 7. Thus, as noted above, there was no reasonable accommodation which the Navy could have made to maintain him as an employee, including allowing him to take sick leave, as such leave would have had no effect on a permanent and total disability. Therefore, the Court finds that plaintiff has failed to demonstrate sufficient evidence of any unlawful use of CPI 752 as a violation of his Due Process rights. The Court hereby clarifies that summary judgment is entered against him and for defendant on this claim.

C. Plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA

Finally, plaintiff argues this Court failed to rule on his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA by terminating him. The Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims.

III. CONCLUSION

Having considered the parties' submission and the record in this case, the Court hereby CLARIFIES its Order of December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000.

IT IS SO ORDERED.

Dated: May 23, 2001

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX E

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed Jun 08 2001

On May 31, 2001, the Court received plaintiff's ex parte motion for leave to alter or amend the judgment in the instant case. The Judgment was issued on December 7, 2000. On the same date, the Court issued an Order denying plaintiff's motion for reconsideration, and reiterating its earlier grant of summary judgment to defendant. See Order of December 7, 2000; Order of August 9, 1999. By the instant motion, plaintiff presents two matters he believes merit the Court's attention. For the reasons stated below, the Court DENIES plaintiff's ex parte motion.

I. DISCUSSION

1. The Affirmative Action Claim

Plaintiff first states that he believes the Court has not explicitly ruled on his "distinct and separate affirmative

action accommodation claim pursuant to 29 USC Section 791." Mot. Of May 31, 2001 at 1. Plaintiff submits that:

> [t]he standard a party must meet to establish a violation of Section 501 [of the Rehabilitation Act, codified at 29 USC Section 791], especially when the requested affirmative action accommodation does not involve an employee's ability to function on the job or the facilitation of employment tasks, is not the same as in Section 504 [of the Rehabilitation Act, codified at 29 USCV 794] because it is well established that Section 501 provides greater protection and imposes [] even greater duties and obligation upon federal agencies to take affirmative action to accommodate federal employees who are "individuals with disabilities."

Ex parte Motion at 2. This passage indicates that plaintiff believes that Section 501 of the Rehabilitation Act affords employees of the government more protection than Section 504. The Court need not reach this issue, as Section 501 – whatever its scope of protection relative to Section 504 – does not provide relief to plaintiff.

Under Section 501, codified at 29 USC Section 791, the duty of federal employers "goes beyond mere nondiscrimination" to an "affirmative obligation to accommodate." Buckingham v. U.S., 998 F.2d 735, 739 (9th Cir. 1993). This obligation to accommodate means that "[a]n agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." Id. (quoting 29 C.F.R. Section 1613.704(a)) (emphasis added).

The Court has made clear in previous Orders that plaintiff has not presented a genuine issue of material fact that he is a "qualified handicapped...employee" or an "otherwise qualified" disabled person. See Order of August 9, 1999 at 6-10; Order of December 7, 2000 at 4, 6-11; Order of May 23, 2001 at 6. The regulations define "Qualified Handicapped" individuals as those who, with or without reasonable accommodation, can perform the essential functions of their job. See Buckingham, 998 F.2d at 740 (citing 29 C.F.R. Section 1613.702(f)). Based on plaintiff's repeated statements that he was totally and permanently disabled, the Court concluded that plaintiff could not and would never be able to perform the essential functions of his job. See Order of August 9, 1999 at 6-10; Order of December 7, 2000 at 4, 6-11; Order of May 23, 2001 at 6. Plaintiff is therefore not entitled to relief under 29 USC Section 791, whether the claim is construed as a "separate and distinct affirmative action claim," as described by plaintiff, or otherwise.

2. The Claim Pursuant to 5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)

Plaintiff also requests that the Court alter its judgment with respect to his claim that the Navy's denial of paid sick leave violated the above-cited laws. The Court has reviewed plaintiff's Complaint in this case, and finds that plaintiff never alleged a cause of action under these statutes and regulations. See Complaint of December 18, 1996. Because the Court and defendant were not apprized of this claim, and because the Court believes that amendment of the Complaint at this late juncture—more than four years after the inception of the suit—would prejudice defendant, plaintiff may not now seek relief pursuant to these statutes and regulations.

II. CONCLUSION

The Court DENIES plaintiff's ex parte motion for leave to alter or amend the judgment in this case. The Judgment of December 7, 2000 stands.

IT IS SO ORDERED

Dated: June 8, 2001

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX F

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed Jul 11 2001

On July 8, 2001, the Court received plaintiff's ex parte motion for reconsideration of this Court's denial of plaintiff's May 31, 2001 motion to alter or amend this Court's Judgment of December 12, 2000 and/or in the alternative, notice of appeal. Plaintiff argues in his motion that this Court's judgment was a clear error of law due to this Court's unwillingness to import into 28 USC Section 791 a separate and distinct "affirmative action" cause of action that does not necessitate that the plaintiff be "otherwise qualified."

Plaintiff's arguments are merely a repetition of the arguments in his previous ex parte motion for reconsideration. As such, under the local rules, this Court cannot consider them. See L. R. 7-9(c). Plaintiff's motion is therefore DENIED. The Court notes plaintiff's notice of

appeal and directs him to perfect his appeal with the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED

Dated: July 11, 2001

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REMIGIO I. AGUSTIN,
Plaintiff-Appellant

v.

JOHN H. DALTON, Secretary, U.S. Dept. of the Navy,
Defendant-Appellee.

No. 01-16364
DC No. CV-96-04527 DLJ

ORDER
Filed Oct 10 2002

Before: O'SCANNLAIN, BERZON, and RAWLINSON, Circuit Judges

The panel has voted to deny Agustin's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to hear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.

Amendments to the Constitution of the United States:

Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

29 USC Section 791(b):

"Employment of individuals with disabilities...(b) Federal agencies; affirmative action program plans. Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."

29 USC Section 794a(a)(1):

"The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C.2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to

take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy."

42 USC Section 12201(b):

"Relationship to other laws. Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter."

65 Statute 681, Section 204(a), (b), the Statute from which 5 USC Section 6307 was codified, states that:

"(a) Officers and employees to whom this title applies shall be entitled to sick leave with pay...(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, shall accumulate and be available for use in succeeding years."

5 USC Sections 6307(a),(b):

"(a) An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period, except that sick leave with pay accrues to a member of the Firefighting Division of the Fire Department of the District of Columbia on the basis of two-fifths of a day for each full biweekly pay period. (b) Sick leave provided by this section, which is not used by an employee, accumulates for use in succeeding years."

5 USC Section 6303(a)(3):

"An employee is entitled to annual leave with pay which accrues as follows:...(3) one day for each full biweekly pay period for an employee with 15 or more years of service."

5 USC Section 8118(c):

"An employee may use annual or sick leave to his credit at the time the disability begins, but his compensation for disability does not begin, and the time periods specified by section 8117 of this ttle do not begin to run, until termination of pay as set forth in subsections (a) and (b) or the use of annual or sick leave ends."

5 USC Section 5596(a)(1), (b)(1)(A)(i):

"Back pay due to an unjustified personnel action. (a) For the purpose of this section, 'agency' means-(1) an executive agency...(b)(1) An employee of an agency

who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee-(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect-(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period".

28 USC Section 1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 USC Section 1367(a):

"Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

5 USC Section 7701(a):

"An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

5 USC Section 7511(a)(1)(A):

"(a) For the purpose of this subchapter-(1) 'employee' means-(A) an individual in the competitive service-(i) who is not serving a probationary or trial period under an initial appointment; or (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less".

5 USC Section 7512:

"Actions covered. This subchapter applies to-(1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less; but does not apply to-(A) a suspension or removal under section 7532 of this title, (B) a reduction-in-force action under section 3502 of this title, (C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager, (D) a reduction in grade or removal under section 4303 of this title, or (E) an action initiated under section 1215 or 7521 of this title".

5 USC Section 7513(d):

"Cause and procedure...(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title."

APPLICATION FOR LEAVE

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from Agustin's 2-16-95 APPLICATION FOR LEAVE (exhibit 3 of Agustin's 12-18-96 Complaint with the District Court):

1. Name: "Remigio I. Agustin"

2. Employee ID Number: "18930"

4-A From: "01-23[-95], 0615 AM"

4-B To: "Until further notice"

5. I hereby request: "Sick Leave"

6. Remarks: "Please cancel last application for leave requesting LWOP. Request sick leave due to occupational injury".

7. Employee's Signature: /s/"Remigio I. Agustin"

8. Date: (signed by employee) "2-16-95"

OFFICIAL ACTION ON APPLICATION

"check mark" Approved /s/"B. MACLEAN"

Date: (signed on) "2/28/95"

Revised 3/79
OFFICE OF PERSONNEL MANAGEMENT
FPM Supps. 990-1, S-1-1-0

FI-112

APPLICATION FOR LEAVE

INSTRUCTIONS: Please complete items 1-6 after reading the Privacy Act Statement shown below.

1. Name (Print or type—Last, First, M.I.): AGUSTIN, REMIGIO I.

2. Employee I.D. Number: 15530

3. Organizational Unit

4-A. FROM: Month 01 Day 23 Hour 0615 A.M. P.M.

4-B. TO: Month Day Hour A.M. P.M. UNTIL FURTHER NOTICE

4-C. Total Number of Hours

5. I hereby request (If more than one box is checked, explain in Item 6, Remarks):

- [ ] Annual Leave. (Annual leave requested may not exceed the amount available for use during the leave year.)
- [X] Sick Leave. (Complete reverse side of form.)
- [ ] Leave Without Pay.
- [ ] Compensatory Time.
- [ ] Other. (Specify)

6. Remarks: PLEASE CANCEL LAST APPLICATION FOR LEAVE REQUESTING LWOP. REQUEST SICK LEAVE DUE TO OCCUPATIONAL INJURY

7. Employee's Signature: Remigio I. Agustin

8. Date (Month, Day, Year): 2-16-95

OFFICIAL ACTION ON APPLICATION

- [X] Approved
- [ ] Disapproved (If disapproved, give reason. If annual leave, initiate action to reschedule.)

Signature (Annual leave approved may not exceed the amount available for use during the leave year.): B. Tidalgo

Date (Month, Day, Year): 2/28/95

NSN 7540-00-753-5067

Please detach this notice before submitting SF 71.

PRIVACY ACT STATEMENT

Section 6311 of Title 5 to the U.S. Code authorizes collection of this information. The primary use of this information is by management and your payroll office to approve and record your use of leave. Additional disclosures of the information may be: To the Department of Labor when processing a claim for compensation regarding a job connected injury or illness; to a State unemployment compensation office regarding a claim; to Federal Life Insurance or Health Benefits carriers regarding a claim; to a Federal, State, or local law enforcement agency when your agency becomes aware of a violation or possible violation of civil or criminal law; to a Federal agency when conducting an investigation on you for employment or security reasons; to the Office of Personnel Management or

(Continued on Reverse)

BEST AVAILABLE COPY

MEMORANDUM OF SICK LEAVE APPROVAL

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from the Navy's 28 Feb 95 MEMORANDUM (exhibit 19 of Agustin's 12-18-96 Complaint with the District Court):

12630
052:BM
28 Feb 95

MEMORANDUM

From: Head, P-3 Weapon System Engineering Division (Code 052)

To: Remigio I. Agustin, P-3 Weapon System Engineering Division (Code 052)

Subj: REQUEST FOR SICK LEAVE

Ref: (a) Your ltr of 16 Feb 95

Encl: (1) Application For Leave

1. This is in response to reference (a) and to advise you that your request for sick leave is approved. A copy of your Application For Leave is provided herewith as enclosure (1). You are reminded that if your sick leave account becomes exhausted your absence will automatically be charged to annual leave and if that account becomes exhausted your absence will be charged to leave without pay.

/s/"B. MACLEAN"

12630
052:BM
28 Feb 95

MEMORANDUM

From: Head, P-3 Weapon System Engineering Division (Code 052)
To: Remigio I. Agustin, P-3 Weapon System Engineering Division (Code 052)

Subj: REQUEST FOR SICK LEAVE

Ref: (a) Your ltr of 16 Feb 95

Encl: (1) Application For Leave

1. This is in response to reference (a) and to advise you that your request for sick leave is approved. A copy of your Application For Leave is provided herewith as enclosure (1). You are reminded that if your sick leave account becomes exhausted your absence will automatically be charged to annual leave and if that account becomes exhausted your absence will be charged to leave without pay.

B. MACLEAN

MR. AGUSTIN'S LEAVE AND EARNINGS STATEMENT FOR PAY PERIOD ENDING: 04/29/95

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from his "CIVILIAN LEAVE AND EARNINGS STATEMENT" for "PAY PERIOD END 04-29-95" (exhibit 217 of Agustin's 4-27-99 Cross Motion for Summary Judgment before the District Court):

DEPARTMENT OF DEFENSE
CIVILIAN LEAVE AND EARNINGS STATEMENT

Name: AGUSTIN, REMIGIO I.

CURRENT EARNINGS: LUMP SUMP PAID 444.8 [HOURS OF ANNUAL LEAVE]

LEAVE:

SICK [LEAVE]	252.9 [HOURS] CURRENT BALANCE

THIS REPORT CONTAINS INFORMATION SUBJECT TO THE PRIVACY ACT OF 1974 AS AMENDED

DEPARTMENT OF DEFENSE
CIVILIAN LEAVE AND EARNINGS STATEMENT

PAY PERIOD END: 04/23/95
PAY DATE: 05/05/95

NAME				
AGUSTIN REMIGIO I	WD 00 00	28.47	42.71	
SSN				
573-29-9090		W	09/13/68	240
ALLOTMENTS - DEF. PAY				
ALFA FED CR UN				

TAX	MARITAL STATUS	EXEMPTIONS	ADD'L	STATE	MARITAL STATUS	EXEMPTIONS	ADD'L	SPECIAL AUTHORITY
FED	M	4						
CA	M	4						

CSRS: 10238.83

	CURRENT	YEAR TO DATE
GROSS PAY	13802.26	31132.42
TAXABLE WAGES	15920.09	32173.84
NONTAXABLE WAGES		
TAX DEFERRED WAGES	50.94	923.44
DEDUCTIONS	5359.86	10831.94
AETC		
NET PAY	8442.40	20300.48

TSP DATA — EARNINGS FOR TSP CALC (CURRENT) 1138.80

S1	G FUND:	0%
	F FUND:	0%
	C FUND:	100%

EARNINGS FOR TSP CALC (YTD) 18468.96

CURRENT EARNINGS

TYPE	HOURS/DAYS	AMOUNT	TYPE	HOURS/DAYS	AMOUNT	TYPE	HOURS/DAYS	AMOUNT
REGULAR	40.00	1138.80	LUMP SUM PD	444.00	12663.46			

DEDUCTIONS

TYPE	CODE	CURRENT	YEAR TO DATE	TYPE	CODE	CURRENT	YEAR TO DATE
CHARITY			3.50	FEGLI	Z	10.23	92.07
FEGLI OPTNL	ABC	22.22	199.98	MEDICARE		200.13	451.42
ORG/UNION	BVA	3.50	24.50	RETIRE, CSRS	1	79.72	1292.82
TAX, FEDERAL		4222.37	6468.75	TAX, STATE	CA	764.75	1375.46
TSP SAVINGS		50.94	923.44				

LEAVE

TYPE	PRIOR YR BALANCE	ACCRUED PAY PD	ACCRUED YTD	USED PAY PD	USED YTD	DONATED/ RETURNED	CURRENT BALANCE	USE-LOSE/ TERM DATE
ANNUAL	240.00		56.00					
SICK	808.90		28.00	40.00	584.00		252.90	
RESTORED			148.00					99/99/99
HOLIDAY					16.00			

REMARKS

ENROLL IN TSP - DEADLINE 31 JUL
BUY US SAVINGS BONDS
LUMP SUM PAID
RETROACTIVE LEAVE ADJUSTMENTS PROCESSED
RETROACTIVE TIME AND ATTENDANCE ADJUSTMENTS PROCESSED

BEST AVAILABLE COPY

MSPB HEARING RECORDS

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, (except for the inserts for clarification), from the 12-21-95 MSPB Hearing Records (App. J-8, 9). App. J-8, 9 were attached with his 4-27-99 Cross Motion for Summary Judgment before the District Court:

12-21-95 Merit Systems Protection Board (MSPB) hearing records at pages 12 to 13:

(Note: Mr. B. Maclean was Mr. Agustin's supervisor only from January 13, 1995 thru April 21, 1995 and who issued to Agustin the 2-10-95 Advance Notice of Proposed Separation, which was pursuant to the Navy's Civilian Personnel Instructions (CPI) 752--Department of the Navy Disciplinary Actions, with the charge of "unavailability for duty", after Agustin was on approved FECA injury absence from his new P&E position for 21 work days only (1-13-95 to 2-10-95). Effective on 1-13-95, Mr. Agustin was downgraded and demoted from his position of a second level supervisor, Machinist Supervisor II, all the way down to the non-supervisory position of Planner and Estimator (P&E), which Mr. Agustin has never held before in his entire federal career.)

Page 12, line 25 thru page 13, line 2:

> Q. [Question to Mr. Maclean] After April 21st, 1995, did you submit a Request for Personnel Action to fill Appellant's [Mr. Agustin's] former position with a permanent appointment?

Page 13, line 3: A. [Answer of Mr. Maclean] No.

12-21-95

position prior to January 13, was this person working for you on January 13, Mr. MacLean?

A. The person who was occupying the position prior to you?

Q. Yes, sir..

A. Yeah, he was working for me on January 13th.

Q. Was this person working for you on February 10, 1995?

A. Yes.

Q. Was he working for you on April 21st, 1995?

A. Now, what date was that?

Q. April 21st, 1995, the effective date of the firing of the Appellant.

A. Yes, I believe he was, but the person that had been occupying that position was no longer a planner and estimator.

Q. Did you -- what is this person's EEO racial designation, Mr. MacLean?

MR. DAWSON: Would you mind talking up a little louder, we couldn't hear you.

Q. What is this person's EEO racial designation? Is the employee White, Hispanic, Black?

MR. DAWSON: What's the ethnic background of the employee?

THE WITNESS: He was White.

BY MR. AGUSTIN:

Q. After April 21st, 1995, did you submit a Request for

12-21-95

Personnel Action to fill Appellant's former position with a permanent appointment?

A. No.

Q. From January 13, 1995, to April 21st, 1995, was Appellant on approved sick leave status?

A. Give me those dates again.

Q. January 13 to April 21st, 1995.

A. I am not sure of the specific dates. I do know that Mr. Agustin had a leave buy-back that we approved sick leave for as a result of that buying back of leave. But I'm not sure of the specific date when that began and when it ended.

MR. AGUSTIN: That's the service card from Payroll Office which indicates I was on sick leave from January 13th to April 21st. Is the Agency disputing that?

MR. DAWSON: No, we are not.

MR. AGUSTIN: Thank you.

BY MR. AGUSTIN:

Q. Mr. MacLean, was Appellant on approved sick leave because he was disabled?

A. He was on approved sick leave because he applied for sick leave and based upon the record he had a doctor's medical report that -- that said that he was unavailable for duty.

MR. AGUSTIN: Your Honor, would you have Mr. MacLean answer the question, please?

ADMINISTRATIVE JUDGE LEE: I think he has.

NAVY'S BRIEF BEFORE THE NINTH CIRCUIT WITH RESPECT TO THE TIMELINESS OF AGUSTIN'S 7-11-01 APPEAL

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from page 2 and page 3 of the Navy's Brief ("BRIEF FOR DEFENDANT-APPELLEE") before the Ninth Circuit:

QUOTE: "[Page 2] On December 7, 2000, the District Court denied plaintiff's motion for reconsideration and again entered judgment in favor of the defendant, but requested additional briefing. GER 141, 154; CD# 84, # 85. Thereafter, the District Court entertained several ex parte motions by Agustin, considering them motions for reconsideration or to amend or alter the judgment. On June 8, 2001, the District Court entered its order denying Agustin's motion to amend or alter the judgment. GER 170; CD # 90. Agustin filed a notice of appeal on July 11, 2001. GER 175; CD # 92.

This Court has jurisdiction to hear the appeal pursuant to 28 USC Section 1291. Agustin filed his notice of appeal within sixty days of the District Court's order of [page 3] June 8, 2001, denying leave to alter or amend the judgment. Therefore, his notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure." UNQUOTE.

complaint, Agustin alleged that the Navy wrongfully terminated his employment in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. On August 9, 1999, the District Court granted defendant's motion for summary judgment and entered judgment against plaintiff and in favor of defendant on all claims. Order of August 9, 1999. GER[1] 120, 133; CD[2] # 67, # 68. On August 18, 1999, Agustin filed a motion for reconsideration. On December 7, 2000, the District Court denied plaintiff's motion for reconsideration and again entered judgment in favor of the defendant, but requested additional briefing. GER 141, 154; CD # 84, # 85. Thereafter, the District Court entertained several ex parte motions by Agustin, considering them motions for reconsideration or to amend or alter the judgment. On June 8, 2001, the District Court entered its order denying Agustin's motion to amend or alter the judgment. GER 170; CD # 90. Agustin filed a notice of appeal on July 11, 2001. GER 175; CD # 92.

This Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291. Agustin filed his notice of appeal within sixty days of the District Court's order of

---

[1]References to the Supplemental Excerpt of Record filed by the Government are referred to as "GER __."

[2]References to the Civil Docket sheet are referred to as "CD # __."

June 8, 2001, denying leave to alter or amend the judgment. Therefore, his notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court properly dismissed Agustin's Rehabilitation Act claim on the ground that Agustin was not a "qualified individual" within the meaning of the Rehabilitation Act, 29 U.S.C. § 701, et seq.

2. Whether the District Court properly rejected Agustin's argument that the Navy, as a federal sector employer, had a separate and more stringent "affirmative obligation" to accommodate his disability under Section 510 of the Rehabilitation Act, 29 U.S.C. § 791.

STATEMENT OF THE CASE

Plaintiff Remigio Agustin was employed as a machinist at the Alameda Naval Aviation Depot. On December 14, 1993, Agustin slipped in a puddle of water and sustained an on-the-job injury. He returned to work for two days in January 1994, but then left work and never returned to his job thereafter. GER 4, 9; Kamlet Decl., Ex. A. CD #38.

In September 1994 Agustin advised the Navy that he believed himself to be "permanently and totally disabled because of [his] physical and psychiatric condition." GER 24; Kamlet Decl. Ex. F; CD # 38. In July 1995 he again stated

MOST RELEVANT FACTS:

1. It is undisputed by the Navy, and Agustin had declared under oath and under penalty of perjury under the laws of the United States: that Agustin has an honorable and outstanding more than 26 years of federal service in time of war and in peace, as a Vietnam veteran and as a U.S. Navy civilian federal employee; that he was recognized and awarded with eight or nine consecutive SUSTAINED SUPERIOR PERFORMANCE (SSP) AWARDS up to 1993 (the year of his unfortunate work accident), and that he had excellent attendance records and had been recognized and awarded five consecutive "ZERO SICK LEAVE" USAGE AWARDS from 1985 to 1990, by his employing federal agency (Naval Aviation Depot, Alameda, California 94501); that prior to his disciplinary removal on April 21, 1995, he has never received a disciplinary action during his entire federal career; and that he has never filed a grievance nor EEO discrimination complaint nor a Federal Employees Compensation Act (FECA) disability claim prior to his 12/14/93 work injury.

2. On 12-14-93, Agustin sustained a Federal Employees Compensation Act (FECA)-on-the-job injury due to unsafe work conditions. He timely filed a FECA claim, through the Navy, and in April 1994, his neck and back injuries and disabilities were accepted by the federal government as occupational injuries under FECA.

3. In January 1994 and in March 1994, as a second level, supervisory production manager (Machinist Supervisor II) in the Production Department, Agustin filed EEO racial discrimination complaints against his employing federal agency and he reported and exposed the agency's racially-biased practice of tolerating or ignoring unsafe,

production work conditions for very long years against minority employees based on race.

4. In June 1994, Agustin was demoted, not to any available and numerous first level supervisory positions in the agency, which he was qualified (with his then more than 12 years of supervisory experience and with his educational qualification--a Bachelor of Science Degree in Production and Operations Management), but all the way down from a second level supervisory production manager position to a non-supervisory position (Planner and Estimator or P&E), (a position the agency has no need to fill (and which the agency had admitted it did not fill after Agustin's removal (see App. J-7, 8, and 9), and a position which is undisputed by the Navy and which Agustin has declared under oath and under penalty of perjury that he has never occupied before in his entire federal career prior to 1-13-95), under the pretext of a RIF. (RIF affected employees have saved pay for two years and there is no immediate loss in pay).

5. On January 13, 1995, Agustin's demotion to P&E and his transfer to another department (Planning Department), a department in which he has never worked before, became effective.

6. On February 10, 1995, after being on approved absence from his new P&E position for 21 work days only (1-13-95 to 2-10-95) due to his FECA-approved occupational injury or disability, based on his filings of EEO discrimination complaints against his employing federal agency, his exercised of his FECA and sick leave rights, and/or his disability, the Navy issued to Agustin an Advance Notice of Proposed Separation, pursuant to the Navy's Civilian Personnel Instructions (CPI) 752--Department of the Navy Disciplinary Actions, with the

charge of "unavailability for duty". It is undisputed by the Navy that Agustin's "unavailability for duty" was solely caused by his FECA-accepted medical conditions, injuries, or disabilities; he was on FECA continuation of pay (COP) from 12-15-93 to 1-31-94, on FECA compensation from 2-1-94 to 1-22-95, and on approved sick leave due to his FECA injuries or disabilities from 1-23-95 to 4-21-95.

7. **On 2/16/95, Agustin initiated the interactive process**, he gave notice to the Navy of his need for affirmative action accommodation, he submitted his sick leave-affirmative action accommodation request: to use "sick leave due to occupational injury" (App. J-1, 2) to enjoy or exercise his substantive, constitutional right to medical care or treatment due to his FECA injuries or disabilities, and he triggered the Navy's 5 USC Section 6307 and 29 USC Section 791 legal duties and obligations.

8. Since Agustin's FECA-on-the-job injury on 12/14/93, the Navy has been fully aware and has total and complete knowledge of his FECA-occupational injuries and disabilities and his continuous and continuing pains, agonies, and sufferings (see 5 USC Section 8147(b)), and on 2/28/95, the Navy "approved" Agustin's sick leave-affirmative action accommodation request to use sick leave–to enjoy or exercise his constitutionally-protected, statutory and regulatory rights to use sick leave pursuant to 5 USC Sections 6307 and 8118(c), and 5 CFR Section 630.401(a)(1), (2) and his substantive constitutional right to medical care or treatment–until his sick leave and annual leave accounts "become[] exhausted" (App. J-3, 4). App. J-2 and J-4 were part of the records in his 12-18-96 Complaint.

9. **On 4/12/95, the Navy, without engaging in any interactive process**, (without even bothering to write, or to call, Agustin and his treating physicians to find out what affirmative action accommodations or reasonable accommodations could have been made, such as (a) allowing him to enjoy or exercise his constitutionally-protected rights to use sick leave until his sick leave and annual leave accounts "become[] exhausted" (App. J-3, 4) to pursue his continuous and continuing need for uninterrupted medical care or treatment, or (b) disability retirement counseling under 5 CFR Section 831.1205(b)(1), **took its "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1))** pursuant to the Navy's Civilian Personnel Instructions (CPI) 752--Department of the Navy Disciplinary Actions, in very quite clear violations of his rights under 5 USC Sections 6307 and 8118(c) and under 29 USC Section 791. (Agustin presented four (4) proposed accommodations before the District Court, which was at Note 9 at page 12 of Agustin's Informal Brief before the Ninth Circuit).

10. **On 4/21/95 (the effective date of the Navy's 4-12-95 disciplinary removal action, Agustin has unused and remaining, 252.9 hours of accumulated sick leave and 444.8 hours of accumulated annual leave** (App. J-5, 6), which he has statutory and regulatory rights, and constitutional-Equal Protection right, to use, like "all persons similarly situated" whose absence was due to injury or illness. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); also see 5 USC Sections 6307 and 8118(c), and 5 CFR 630.401(a)(1),(2). It is undisputed and indisputable by the Navy that all of Agustin's absence or "unavailability for duty" was all for the exercised of his constitutionally-protected statutory rights under FECA and under 5 USC Section 6307 and for the exercised of his substantive constitutional right to medical care or treatment and his

constitutional Equal Protection right, and that the Navy's 4-12-95 punishment, retaliation, and/or disciplinary removal action against him did not involved any misconduct nor the use of any illegal drugs.

11. During the 12-21-95 MSPB hearing, the Navy had admitted that it had no need to replace Agustin or to fill his position when Agustin's supervisor testified under oath that he did not submit a Request for Personnel Action to fill Agustin's P&E position after his removal. See App. J-7, 8 and 9.

12. "[D]efendant does not dispute that plaintiff qualifies as 'disabled' under the Rehabilitation Act". District Court's 8-9-99 Order, at 6.

13. "**[T]here is no evidence that defendant engaged in an interactive process with plaintiff to find out what reasonable accommodations could have been made**". App. B-9/District Court's 12/7/00 Order (bold and underline added). Agustin had presented four (4) proposed accommodations in pages 5 to 6 of his 4-27-99 reply brief and cross motion for summary judgment before the District Court, which was at Note 9 at page 12 of Agustin's Informal Brief before the Ninth Circuit.

14. The Navy's 4-12-95 violations of Agustin's 5 USC Section 6307 and 29 USC Section 791 rights had irreparably harmed or aggravated Agustin's FECA conditions, and on April 13, 2001, the federal government has accepted that since 2-2-95 he has also been suffering from major depression, post traumatic stress disorder, and dementia, with his FECA benefits retroactive from 2-2-95 to present.

MOST RELEVANT DISTRICT COURT PROCEEDINGS:

The District Court has jurisdiction pursuant to 28 USC Section 1331 and 28 USC Section 1343. On 12-18-96, Agustin filed his "Complaint" with the District Court. App. DC-2.

On 12/7/00, the District Court granted summary judgment for the Navy and against Agustin concerning all his claims. App. B-1 to B-11, and B-13; App. M-1.

On 12/11/00, Agustin timely filed his Federal Rules of Civil Procedure, Rule 59(e) motion to alter or amend judgment, which he inartfully entitled as "**Plaintiff's ex parte motion for leave to: request clarification of the Court's 12/7/00 order and judgment, and to withdraw the 12/7/00 judgment and to refile its judgment until after this motion is acted upon**". App. M-1 (bold added).

On 12/11/00, the District Court ordered that "'The Court declines to withdraw the judgment at this time. However, the Court hereby requests that the defendant submit a response to plaintiff's filing, explaining its position on the claims plaintiff believes to be outstanding. Defendant shall file its response within 30 days. <u>After receipt of the defendant's response, the Court may choose to hold a status conference to examine the status of this case</u>." App. C-1 to C-2 (underline added). Also see App. M-2.

On 1/17/01, the District Court received "'Plaintiff's ex parte motion for leave: (1) to present additional arguments and controlling authorities in support of his 12/11/00 motion to clarify, alter, or amend the court's 12/7/00 judgment; and (2) <u>to renew</u> his motion to withdraw the court's 12/7/00 judgment'". App. M-2 (bold and underline added).

On 2/5/01, the District Court received Agustin's motion "for leave **to renew** his request for the court to withdraw its 12/7/00 judgment or for the court to construe his 12/11/00 motion as a motion to alter or amend the court's 12/7/00 judgment, *or in the alternative*, in case this motion is denied, ***plaintiff is filing this document as plaintiff's notice of appeal of this court's 12/7/00 judgment.***" App. M-2 (bold, underline, and italics added).

On 2/16/01, the District Court received the "RESPONSE by defendant John H. Dalton". App. M-3.

On 5/23/01, the District Court issued its Order "DENYING received ex parte request to withdraw the 12/7/00 judgment." App. M-3. "**On December 11, 2000 the Court received plaintiff's request for clarification of the December 7, 2000 Order, and his motion to withdraw the Judgment of the same date** [App. D-1]...Plaintiff's motion to reconsider was denied by Order of December 7, 2000. On the same date, the Court issued judgment in favor of defendants. Plaintiff then moved this Court to withdraw the judgment, and **that motion is now before the Court** [App. D-3]...**the Court hereby CLARIFIES its Order of December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000** [App. D-8]." App. D-1, 3, and 8/District Court's 5-23-01 Order (bold and underline added)).

On 5/31/01, the District Court "RECEIVED Plaintiff's ex parte motion to alter or amend this Honorable Court's judgment". App. M-3.

On 6/8/01, the District Court issued its Order "DENYING ex parte motion for leave to alter or amend the judgment in the instant case." App. M-3.

On 7/2/01, the District Court received Agustin's ex parte motion "to reconsider" (App. DC-5), or if "MOTION IS DENIED...HIS NOTICE OF APPEAL". App. M-3.

On 7/11/01, the District Court issued its Order "DENYING ex parte motion for reconsideration. The Court notes plaintiff's notice of appeal and directs him to perfect his appeal with the U.S. Court of Appeals for the Ninth Circuit." App. M-4. Also see F-1 and F-2/District Court's 7-11-01 Order. On this same date, 7/11/01, the Court filed Agustin's "NOTICE OF APPEAL". App. M-4.

MOST RELEVANT NINTH CIRCUIT COURT PROCEEDINGS:

In its brief before the Ninth Circuit, the Navy has admitted and conceded that: "**Agustin filed a notice of appeal on July 11, 2001...This Court has jurisdiction** pursuant to 28 USC Section 1291. Agustin filed his notice of appeal within sixty days of the District Court's order of June 8, 2001, denying leave to alter or amend the judgment. Therefore, **his notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure**." App. K-1 (bold and underline added). Also see App. K-2, 3. .

On 6-17-02, the Ninth Circuit ordered that: (1) "We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a notice of appeal within 60 days of those orders...The district court correctly denied Agustin's motions because it did not apply incorrect law or utilize erroneous facts", and (2) mystifyingly, that: "**We lack jurisdiction to address Agustin's appeal of the district court's summary judgment** because Agustin failed to file a notice of appeal within 60 days of entry of the order denying his timely, post-judgment motion". App. A-2 (bold and underline added).

On 7-15-02, Agustin timely filed his "petition for rehearing and suggestion for rehearing en banc".

On 7-18-02, the Ninth Circuit received by certified mail with return receipt requested, Agustin's filing entitled: **"APPELLANT'S NOTICE TO THE EN BANC COURT, (TO THE EN BANC COURT, BECAUSE OF HIS PENDING SUGGESTION FOR REHEARING EN BANC AND BECAUSE THIS NOTICE REQUIRES ACTION BY THE EN BANC COURT), THAT OUR U.S. SUPREME**

COURT'S NEW, RECENT, AND RELEVANT OPINION IN HOFFMAN PLASTIC COMPOUNDS, INC., V. NLRB, 122 S.Ct. 1275, 1282-1283 (2002) AND ITS NEW, RECENT, AND RELEVANT INTERPRETATION OF ITS *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS*-CASE LAW IN SWIERKIEWICZ V. SOREMA N.A., 122 S.Ct. 992, 998 (2002), HAVE OVERRULED THIS COURT'S OPINION/CASE LAW IN MCLEAN V. RUNYON, 222 F.3d 1150, 1157 (9TH Cir. 2000)".

On 8-12-02, the Ninth Circuit received by certified mail with return receipt requested, Agustin's filing entitled: **"APPELLANT'S NOTICE TO THE EN BANC COURT, (TO THE EN BANC COURT, BECAUSE OF HIS PENDING SUGGESTION FOR REHEARING EN BANC), THAT THIS HONORABLE COURT'S JUNE 17, 2002 MEMORANDUM DECISION IN THE INSTANT CASE IS IN CONFLICT WITH THIS COURT'S NEW, RECENT, AND RELEVANT OPINION IN ADONICAN V. CITY OF LOS ANGELES, CA9 NO. 01-17303 (AUGUST 6, 2002)".**

On 10-10-02, the Ninth Circuit ordered that: "The petition for panel rehearing and petition for rehearing en banc are denied." App. G-1.

MOST RELEVANT EXCERPTS FROM DISTRICT COURT'S CIVIL DOCKET

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from the District Court's Civil Docket entries, which was certified by the Clerk, U.S. District Court on July 25, 2001:

12/18/96	1	COMPLAINT Summons(es) issued; Fee status pd entered on 12/18/96 in the amount of $120 (page 2 of CIVIL DOCKET)
12/7/00	84	JUDGMENT: by Judge D. L. Jensen, on behalf of John A. Dalton, Secretary of Navy and against plaintiff Remigio I. Agustin (page 12)
12/11/00	–	RECEIVED Plaintiff's ex parte motion for leave to: request clarification of the Court's 12/7/00 order and judgment and to refile its judgment until after this motion is acted upon and Proposed Order (page 12)
12/11/00	–	RECEIVED ex parte motion for leave to: (1) request clarification of the court's 12/7/00 order and judgment, and (2) to withdraw the 12/7/00 judgment and to refile its judgment until after this motion is acted upon submitted by Plaintiff Remigio I. Agustin (page 12)

12/11/00	85	ORDER, by Judge D. L. Jensen. The Court declines to withdraw the judgment at this time. However, the Court hereby requests that the defendant submit a response to plaintiff's filing, explaining its position on the claims plaintiff believes to be outstanding. Defendant shall file its response within 30 days. After receipt of the defendant's response, the Court may choose to hold a status conference to examine the status of this case. (Page 13)
1/17/01	--	RECEIVED Ex parte motion for leave to exceed the page limit of: "Plaintiff's ex parte motion for leave: (1) to present additional arguments and controlling authorities in support of his 12/11/00 motion to clarify, alter, or amend this Court's 12/7/00 judgment; and (2) to renew his motion to withdraw the court's 12/7/00 judgment" (page 13)
2/5/01	--	RECEIVED Ex parte motion and Proposed Order for leave to renew his request for the court to withdraw its 12/7/00 judgment or for the court to construe his 12/11/00 motion as a motion to alter or amend the court's 12/7/00 judgment, or in the alternative, in case this motion is denied, plaintiff is filing this document as plaintiff's notice of

		appeal of this court's 12/7/00 judgment. (page 13)
2/16/01	86	RESPONSE by defendant John H. Dalton (page 13)
2/21/01	--	RECEIVED Ex parte motion for leave to file a reply to "defendant's response", which was filed on 2/16/01 submitted by Plaintiff Remigio I. Agustin (page 13)
5/23/01	88	ORDER, by Judge D. L. Jensen, DENYING received exparte request to withdraw the 12/7/00 judgment (page 14)
5/31/01	--	RECEIVED Plaintiff's ex parte motion to alter or amend this Honorable Court's judgment in the instant case submitted by Plaintiff Remigio I. Agustin (page 14)
6/8/01	90	ORDER by Judge D. L. Jensen, DENYING exparte motion for leave to alter or amend the judgment in the instant case (page 14)
7/2/01	--	RECEIVED ex parte motion & order to reconsider submitted by Plaintiff Remigio I. Agustin (page 14)

7/11/01	91	ORDER, by Judge D. L. Jensen, DENYING exparte motion for reconsideration. The Court notes plaintiff's notice of appeal and directs him to perfect his appeal with the U.S. Court of Appeals for the Ninth Circuit (page 14)
7/11/01	92	NOTICE OF APPEAL by Plaintiff Remigio I. Agustin from Dist. Court decision order [90-1] Fee status NOT PAID (page 14)
7/16/01	–	RECEIVED re appeal [92-1] fee in amount of $ 105.00 paid in full (page 15)

Proceedings include all events. TERMED RELATE
1:96cv4527 Agustin v. Dalton REFDIS
APPEAL

12/18/96	1	COMPLAINT Summons(es) issued; Fee status pd entered on 12/18/96 in the amount of $ 120.00 (Receipt No. 802821) [4:96-cv-04527] (cg) [Entry date 12/20/96] [4:96cv4527]
12/18/96	2	ORDER RE COURT PROCEDURE and SCHEDULE by Judge Saundra B. Armstrong : initial case management conference will be held 3:00 3/19/97 . (cc: all counsel) (cg) [Entry date 12/20/96] [4:96cv4527]
12/19/96	3	PROOF OF SERVICE of joint case management statement and proposed order. [4:96-cv-04527] (cg) [Entry date 12/23/96] [4:96cv4527]
1/22/97	4	PROOF OF SERVICE by Plaintiff Remigio I. Agustin of joint case management statement and proposed order [4:96-cv-04527] (cg) [Entry date 01/27/97] [4:96cv4527]
2/20/97	5	ANSWER by defendant John H. Dalton to complaint [1-1] [4:96-cv-04527] (cg) [Entry date 02/24/97] [4:96cv4527]
2/25/97	6	RESPONSE by Plaintiff Remigio I. Agustin to defendant's allegation of incomplete service of process, and notice correctly stating requested relief. [4:96-cv-04527] (cg) [Entry date 02/26/97] [4:96cv4527]
3/12/97	7	CLERK'S NOTICE Case Management Conference set for 3:00 4/2/97 ; [4:96-cv-04527] (cg) [Entry date 03/13/97] [4:96cv4527]
3/20/97	8	ORDER by Assignment Committee Case reassigned to Judge D. L. Jensen, relating cases C96-4527 and C96-2154DLJ; () (cc: all counsel) [4:96-cv-04527] (kk) [Entry date 03/21/97] [Edit date 03/21/97] [4:96cv4527]
4/4/97	9	CLERK'S NOTICE Status conference set for 8:30 4/23/97 ; [4:96-cv-04527] (mh) [Entry date 04/07/97] [4:96cv4527]
4/23/97	10	MINUTES: (C/R Not Reported) Status Conference - held; Discovery hearing with Mag Judge Hamilton will be held 4/29/97 [4:96-cv-04527] (mh) [Entry date 04/24/97] [4:96cv4527]
5/1/97	11	CLERK'S NOTICE Status conference set for 9:30 6/4/97 ; [4:96-cv-04527] (mh) [Entry date 05/07/97] [4:96cv4527]
6/4/97	12	MINUTES: (C/R Not Reported) Status conference set for 10am 10/1/97 [4:96-cv-04527] (mh) [Entry date 06/06/97] [4:96cv4527]
6/4/97	13	CLERK'S NOTICE Status conference set for 10am 10/1/97 [4:96-cv-04527] (mh) [Entry date 06/06/97] [4:96cv4527]

Proceedings include all events.
4:96cv4527 Agustin v. Dalton

TERMED RELATE
REFDIS
APPEAL

2/9/00	81	DECLARATION by Remigio I. Agustin iin support of supplemental brief motion to alter or amend judgment [80-1] [4:96-cv-04527] (rl) [Entry date 02/10/00] [4:96cv4527]
2/22/00	--	RECEIVED Ex parte motion for leave to file additional material and relevant evidence and Proposed Order (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (rl) [Entry date 02/23/00] [Edit date 05/11/00] [4:96cv4527]
5/19/00	--	RECEIVED Complaints or Claims againsth the United States submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (rl) [Entry date 05/19/00] [4:96cv4527]
6/1/00	--	RECEIVED Ex Parte motion and order for leave to present new and relevant supporting authority in support of case (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (oh) [Entry date 06/02/00] [Edit date 06/06/00] [4:96cv4527]
6/9/00	--	RECEIVED ex parte motion for leave to present additional and relevant controlling authorities in support of this case submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (kk) [Entry date 06/09/00] [4:96cv4527]
10/24/00	82	MOTION before Judge D. L. Jensen by Plaintiff Remigio I. Agustin for leave to present recent and controlling, 9th Circuit Court of Appeals' decision [4:96-cv-04527] (cp) [Entry date 10/24/00] [4:96cv4527]
12/7/00	83	ORDER, by Judge D. L. Jensen, DENYING motion for leave to present recent and controlling, 9th Circuit Court of Appeals' decision [82-1] (Date Entered: December 8, 2000) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 12/08/00] [4:96cv4527]
12/7/00	84	JUDGMENT: by Judge D. L. Jensen on behalf of John A. Dalton, Secretary of Navy and against plaintiff Remigio I. Agustin (Date Entered: December 8, 2000) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 12/08/00] [4:96cv4527]
12/11/00	--	RECEIVED Plaintiff's ex parte motion for leave to: request clarification of the Court's 12/7/00 order and judgment, and to withdraw the 12/7/00 judgment and to refile its judment until after this motion is acted upon and Proposed Order (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (rl) [Entry date 12/11/00] [4:96cv4527]
12/11/00	--	RECEIVED ex parte motion for leave to: (1) request clarification of the court's 12/7/00 order and judgment, and (2) to withdraw the 12/7/00 judgment and to refile its judgment until after this motion is acted upon submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (rl) [Entry date 12/13/00] [4:96cv4527]

Proceedings include all events. TERMED RELATE
4:96cv4527 Agustin v. Dalton REFDIS
APPEAL

12/11/00	85	ORDER, by Judge D. L. Jensen. The Court declines to withdraw the judgment at this time. However, the Court hereby requests that the defendant submit a response to plaintiff's filing, explaining its position on the claims plaintiff believes to be outstanding. Defendant shall file its response within 30 days. After receipt of the defendant's response, the Court may choose to hold a status conference to examine the status of this case. (Date Entered: December 13, 2000) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 12/13/00] [4:96cv4527]
1/17/01	--	RECEIVED Proposed Order (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (rl) [Entry date 07/17/01] [4:96cv4527]
1/17/01	--	RECEIVED Ex parte motion for leave to exceed the page limit of: "Plaintiff's ex parte motion for leave: (1) to present additional arguments and controlling authorities in support of his 12/11/00 motion to clarify, alter, or amend this court's 12/7/00 judgment; and (2) to renew his motion to withdraw the court's 12/7/00 judgment" and Proposed Order thereon (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (rl) [Entry date 07/17/01] [4:96cv4527]
2/5/01	--	RECEIVED Ex parte motion and Proposed Order for leave to renew his request for the court to withdraw its 12/7/00 judgment or for the court to construe his 12/11/00 motion as a motion to alter or amend the court's 12/7/00 judgment, or in the alternative, in case this motion is denied, plaintiff is filing this document as plaintiff's notice of appeal of this court's 12/7/00 judgment. (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (rl) [Entry date 02/05/01] [4:96cv4527]
2/16/01	86	RESPONSE by defendant John H. Dalton re order received [0-0] [4:96-cv-04527] (kk) [Entry date 02/20/01] [4:96cv4527]
2/21/01	--	RECEIVED Ex parte motion for leave to file a reply to "defendant's response", which was filed on 2/16/01 submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (rl) [Entry date 02/22/01] [4:96cv4527]
3/27/01	87	ATTORNEY SUBSTITUTION: terminating attorney Susan L. Kamlet for John H. Dalton as counsel for by defendant John H. Dalton and substituting attorney Mary Beth Uitti [4:96-cv-04527] (rl) [Entry date 03/28/01] [4:96cv4527]
5/14/01	--	RECEIVED Exparte motion for leave to file and report a recent, material and relevant change in 5 CFR Section 630.401(a)(2) and Proposed Order (Plaintiff Remigio I. Agustin) [4:96-cv-04527] (rl) [Entry date 05/15/01] [4:96cv4527]

Proceedings include all events. TERMED RELATE
4:96cv4527 Agustin v. Dalton REFDIS
APPEAL

5/14/01	--	RECEIVED Plaintiff's exparte motion for leave to file and report a recent, material and relevant change in 5 CFR Section 630.401(a)(2) submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (rl) [Entry date 05/31/01] [4:96cv4527]
5/23/01	88	ORDER, by Judge D. L. Jensen, DENYING received exparte request to withdraw the 12/7/00 judgment [0-0] (Date Entered: May 31, 2001) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 05/31/01] [4:96cv4527]
5/24/01	89	ORDER, by Judge D. L. Jensen, DENYING motion for leave to present recent and controlling, 9th Circuit Court of Appeals' decision [82-1] (Date Entered: May 31, 2001) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 05/31/01] [4:96cv4527]
5/31/01	--	RECEIVED Plaintiff's ex parte motion to alter or amend this Honorable Court's judgment in the instant case submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (rl) [Entry date 06/01/01] [4:96cv4527]
6/8/01	90	ORDER by Judge D. L. Jensen, DENYING exparte motion for leave to alter or amend the judgment in the instant case. [0-0] (Date Entered: June 11, 2001) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 06/11/01] [4:96cv4527]
7/2/01	--	RECEIVED ex parte motion & order to reconsider submitted by Plaintiff Remigio I. Agustin [4:96-cv-04527] (kk) [Entry date 07/05/01] [4:96cv4527]
7/11/01	91	ORDER, by Judge D. L. Jensen, DENYING exparte motion for reconsideration. The Court notes plaintiff's notice of appeal and directs him to perfect his appeal with the U.S. Court of Appeals for the Ninth Circuit. [0-0] (Date Entered: July 12, 2001) (cc: all counsel) [4:96-cv-04527] (rl) [Entry date 07/12/01] [4:96cv4527]
7/11/01	92	NOTICE OF APPEAL by Plaintiff Remigio I. Agustin from Dist. Court decision order [90-1] Fee status NOT PAID - $105.00 DUE [4:96-cv-04527] (rl) [Entry date 07/12/01] [4:96cv4527]
7/13/01	--	Docket fee notification form and case information sheet to USCA [92-1] [4:96-cv-04527] (rl) [Entry date 07/13/01] [4:96cv4527]
7/13/01	--	Mailed request for payment of docket fee to appellant (cc to USCA) [4:96-cv-04527] (rl) [Entry date 07/13/01] [4:96cv4527]
7/13/01	--	Copy of notice of appeal and docket sheet to all counsel [4:96-cv-04527] (rl) [Entry date 07/13/01] [4:96cv4527]

Proceedings include all events. TERMED RELATE
4:96cv4527 Agustin v. Dalton REFDIS
APPEAL

7/16/01 -- RECEIVED re appeal [92-1] fee in amount of $ 105.00 paid in full (Receipt # 4403863) [4:96-cv-04527] (rl) [Entry date 07/16/01] [4:96cv4527]

7/16/01 -- Amended docket fee payment notification mailed to USCA [4:96-cv-04527] (rl) [Entry date 07/16/01] [4:96cv4527]

7/20/01 -- NOTIFICATION by Circuit Court of Appellate Docket Number 01-16364 [4:96-cv-04527] (rl) [Entry date 07/25/01] [4:96cv4527]

7/25/01 93 TRANSCRIPT DESIGNATION and Ordering Form filed by Plaintiff Remigio I. Agustin for dates None Ordered ; ; appeal [92-1] [4:96-cv-04527] (rl) [Entry date 07/25/01] [4:96cv4527]

7/25/01 -- CERTIFICATE of Record mailed to USCA, counsel notified. [4:96-cv-04527] (rl) [Entry date 07/25/01] [4:96cv4527]

APPENDIX N

AGUSTIN'S 7-11-01 NOTICE OF APPEAL

REMIGIO I. AGUSTIN, Plaintiff Pro Se
169 Austin Avenue
Hayward, California 94544
Telephone No. (510)-786-2819

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

No. C-96-4527 DLJ

REMIGIO I. AGUSTIN,)
Plaintiff,)
v.)
JOHN H. DALTON, Secretary)
Department of the Navy,)
Defendant.)
_____)

PLAINTIFF'S EX PARTE MOTION FOR THE COURT TO RECONSIDER ITS JUNE 8, 2001 DENIAL OF PLAINTIFF'S MAY 31, 2001 MOTION TO ALTER OR AMEND THIS HONORABLE COURT'S 12-07-00 JUDGMENT; AND/OR IN THE ALTERNATIVE, IN CASE THIS MOTION IS DENIED, PLAINTIFF IS FILING THIS DOCUMENT AS HIS NOTICE OF APPEAL

Pursuant to Civil L. R. 7-11 and the Federal Rule of Civil Procedure 59(e), plaintiff again respectfully begs for this honorable Court's utmost patience and leniency, and he requests that the Court reconsider its denial of his May 31, 2001 motion to alter or amend its 12-07-00 Judgment, and/or in the alternative, in case this motion is denied,

plaintiff is filing this document as his Notice of Appeal to protect his right to timely appeal this Court's Judgment to the Ninth Circuit U. S. Court of Appeals.

With all due and utmost respect, plaintiff submits that this Court's Judgment was a mystifying, **very clear error of law** and a very clear miscarriage of justice because of: **(1)** the Court's refusal to interpret the statutory construction of the pertinent "affirmative action" accommodation protection provided by 29 USC Section 791 to "individuals with disabilities", **and** to apply and enforce its plain, clear, and unambiguous pertinent statutory language and mandate, which granted greater protection and imposes an even greater duties and obligations upon federal agencies to take "affirmative action" to accommodate "individuals with disabilities" and be a "model employer" of such individuals, (see 29 CFR Section 1614.203(b) and Prewitt v. U.S. Postal Service, 662 F.2d 292, 306 (1981)); and **(2)** the Court's refusal to adjudicate his inextricably intertwined claim of the violation of his statutory and/or regulatory rights granted to him by 5 U.S.C. Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR 630.401(a)(1), (2) based on his accepted occupational injury or disability, and/or the Navy's unconstitutional taking of his property--his sick leave right or benefit.

With all due and utmost respect, the Court's conclusion that "[t]he Court need not reach this issue" (06-08-01 Order, at 2) of the greater affirmative action accommodation protection granted by the clear, plain, and unambiguous language and mandate of Section 501--the "elementary starting point" in interpreting "construction of a statute" (Davis, 442 U.S., at 405)--was a mystifying, **very clear error of law** and a great manifest injustice.

(Note 1: The Court's Judgment very clearly violated the following long line of our U.S. Supreme Court's well established and controlling case law pertaining to statutory construction: Rusello v. U.S., 464 U.S. 16, 23 (1983); Darby v. Cisneros, 113 S. Ct. 2539, 2545 (1993); Garcia v. U.S., 469 U.S. 70, 75 (1984); SEC v. Sloan, 436 U.S. 103, 118 (1977); Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); and Estate of Cowart v. Nicklos Drilling, 505 U.S. 469, 476 (1992). In Lane v. Pena, 518 U.S. 187, 193 (1996), it was held that the "remedies, procedures, and rights set forth" for violations of Section 501 are distinct and different from violations of Section 504. In Section 501, the pertinent individuals with disabilities language was "include[d]" ***seven*** times in granting affirmative action accommodation protection to such individuals. See Rusello v. U.S., 464 U.S. 16, 23 (1983)).

Based on the very unusual and very unique facts in the instant case, the "otherwise qualified" language of 29 USC Section 794 **does not** apply in his 29 USC Section 791 claim and the Court's reliance on the "otherwise qualified" language of 29 USC Section 794, and its implementing regulations, which copied 794's "otherwise qualified" language, was **a very clear error of law** and was a very clear violation of our U.S. Supreme Court's statutory construction case law. "Section 504 [29 USC Section 794] does not refer at all to affirmative action". Davis, 442 U.S., at 410. Section 501 (29 USC Section 791) does not refer at all to "otherwise qualified" individual. In this case, Section 504's "otherwise qualified" language does not limit Section 501's protection.

The Court's Judgment was **a very clear error of law** because the Navy's violations of his rights under 29 USC Section 791 and under 5 USC. Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR

Section 630.401(a)(1), (2)--to use sick leave due to occupational injury--are **inseparable and inextricably intertwined claims** and the Court's Judgment also violated our Ninth Circuit's scope of protection case law in Buckingham v. U.S., 998 F.2d 735, 740 n.3 (9th Cir.1993) and our U.S. Constitution's Equal Protection provision. See Note 2 below.

On February 16, 1995, plaintiff initiated the interactive process and he requested "affirmative action" accommodation pursuant to 29 USC Section 791 **to "use"** (65 Statute 681, Section 204(b)) **"sick leave due to occupational injury"** (exhibit 3 of 12-18-96 Complaint; also see exhibit 19)--which is also a statutory and/or regulatory right or benefit granted by 5 USC Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR Section 630.401(a)(1), (2). Regardless as to whether he was an "otherwise qualified" handicapped individual or not, his request to use sick leave to pursue continuous and adequate medical care or treatment for his injury is not only an **inseparable and inextricably intertwined** "alternative employment opportunit[y] reasonably available under the employer's existing policies" (Arline, 480 U.S. 273, 289 n.19) but **is also plaintiff's inseparable and inextricably intertwined constitutionally protected, statutory and/or regulatory right or benefit as an occupationally injured federal employee** granted by the said statutes and regulations. Additionally, like all other federal employees, regardless as to whether he was an "otherwise qualified" individual or not, plaintiff also has an **inseparable and inextricably intertwined**, constitutional **equal protection right** to **"enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees"** (Buckingham, at 740 (bold added)), which the Navy has also very clearly violated.

(Note 2: "[W]e agree with the Seventh Circuit that **the [Rehabilitation] Act's requirement of reasonable accommodation is not limited to an employee's ability to function on the job**...we have found nothing in the Act or its legislative history to indicate that Congress intended to limit the employer's duty of reasonable accommodation to the facilitation of employment tasks." Buckingham v. U.S., 998 F.2d 735, 740 n.3 (9th Cir.1993) (bold and underline added). Also see McWright v. Alexander, 982 F.2d 222, 227 (7th Cir.1992); Fedro v. Reno, 21 F.3d 1391, 1395-6 (7th Cir.1994); 42 USC Section 12201(b); and 29 CFR Part 1630, Appendix to Part 1630, Section 1630.1(b) and (c). "Although this [interactive] process is described [] in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, **it is equally applicable ...to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment**." 29 CFR 1630, Appendix to Part 1630, Section 1630.9, (bold and underline added). Furthermore, "the ADA [or the Rehabilitation Act] does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation." Humprey v. Memorial Hospitals Association, CA9 No. 98-15404 (02-13-01)).

Furthermore, the Court's conclusion that "plaintiff never alleged a cause of action under these statutes and regulations...the Court and the defendant were not apprized of this claim" (06-08-01 Order, at 3)--his sick leave right or benefit claim--**were very clear fatal errors of facts against the plaintiff**. See Note 3 below.

(Note 3: "The **use of accrued sick leave...is a benefit** which is a 'term, condition, or privilege' of appellant's federal employment...He merely wanted to enjoy, avail of,

and exercise the same **benefit** which everybody else were and are granted--**the benefit to use his available sick leave** (for an occupational injury or condition)". Pages 28-29 of 12-18-96, ATTACHMENT TO COMPLAINT, (bold and underline added). "The removal action is VOID AB INITIO because the agency **unconstitutionally took his property interest...--the right or benefit to use his accrued sick leave**...due to his occupational injury or condition...**the agency unfairly and unjustly PUNISHED him by unconstitutionally taking his constitutionally protected property**...This unconstitutional taking of his property--his sick leave benefits--violated his constitutional right to due process of law." Page 17 of 04-27-99, PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, (bold and underline added). "[T]his Court has jurisdiction over the agency's unconstitutional taking of his constitutionally protected property--**the right or benefit to use his accrued sick leave** due to his occupational injury or condition". Page 18 of PLAINTIFF'S ARGUMENTS FOR THE JULY 21, 1999 HEARING, which he filed on 07-21-99 during the oral hearing. "The Court's [8-9-99] ORDER was very clearly erroneous because the Court failed to consider his relevant constitutional claim concerning the unconstitutional taking of his constitutionally-protected property [--his sick leave rights or benefits]". Page 17 of 08-18-99, PLAINTIFF'S EX PARTE MOTION. "Plaintiff's affirmative action/reasonable accommodation request was to exercise his constitutionally-protected right or property--**his 5 USC Section 6307 statutory right or benefit** to use his **approved** sick leave due to his occupational injury or condition and/or **his statutory right or benefit under FECA** (see 5 USC Section 8118(c)." Page 3 of Plaintiff's 09-29-99 Motion, (bold and underline added). "Even assuming arguendo that the Rehabilitation Act does not exist, why would plaintiff's right or benefit to use his **approved**, sick leave due solely to his accepted occupational injury or

condition be unconstitutionally taken away from him without just compensation when **it is his constitutionally-protected statutory rights or benefits under 5 USC Section 6307 and under FECA**?" Pages 83-84 of 01-03-00, PLAINTIFF'S SUPPLEMENTAL BRIEF, (bold and underline added). Also see Plaintiff's 12-11-00 Motion, at 1, and Defendant's 02-16-01 Response, at 1-2.)

Deprivation of such constitutionally protected right or benefit is a judicially cognizable cause of action under 5 USC Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR Section 630.401(a)(1), (2), **and** plaintiff has timely and duly presented such violation in his 12-18-96 Complaint, in his 04-27-99 Reply Brief, during the 7-21-99 oral hearing, and repeatedly, throughout the Court's proceedings, and this claim is inextricably intertwined with his Section 501 claim.

Based on all the foregoing reasons, this motion should be granted. In the alternative, in case this motion is denied, plaintiff is hereby filing this document as his Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted, through, and with help and assistance from friends,

/s/REMIGIO I. AGUSTIN